IN THE
SUPREME COURT OF THE UNITED STATES

NO. 78-430

EDGAR TODD, JR., and
ALICE TODD,

Petitioners

versus

ASSOCIATED CREDIT BUREAU SERVICES, INC.,
GENERAL CREDIT CONTROL, INC., and
HESS'S, INC.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Edgar Todd, Jr., and Alice Todd, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Third Circuit.

OPINIONS BELOW

The judgment and order of the United States Court of Appeals, Third Circuit, rendered June 6, 1978, is unsupported and appears at Appendix "A", infra, Page 54 .

Judgment and Order of the United States District Court, Eastern District of Pennsylvania, rendered September 9, 1977, is reported _____F Supp _____(CED, Pa, 1977) and appears at Appendix "B", infra, Page 55 .

JURISDICTION

The final judgment of the United States Court of Appeals, Third Circuit, was rendered on June 6, 1978, and the Petition for Writ of Certiorari is timely filed within ninety (90) days herof. The jurisdiction of this Court rests upon 28 U.S.C. , and Rule 22 of this Court.

QUESTIONS PRESENTED

The question presented for consideration in the instant case is three-fold: 1) whether or not the Defendants are "consumer reporting agencies within meaning of the Fair Credit Reporting Act, 15 U.S.C. §1680 et seq; where the uncontradicted

evidence establishes that one of the defendants acts as a consumer reporting agent, the second, a department store, acts in a cooperative exchange of information with the consumer reporting agency, and the third acts as agent of the department store in the cooperative exchange of information; 2) whether or not the Defendants acted negligently and willfully in failing to follow reasonable precedures to assure maximum possible accuracy as required by 15 U.S.C. §1681 e(b) and 15 U.S.C. §1681(b) by reporting stale and misleading information concerning Plaintiffs by reporting to the business community a balance owed, when, in fact, the balance has been fully paid; and 3) whether or not consumer reporting agencies are mandated to advise consumers their right to request up-dates to all businesses who received disputed information where the information is incomplete and inaccurate.

Review by certiorari is appropriate in the case at bar under Rule 19 (1)(b) of the Rules of this Court for the following reasons: a) the Fair Credit Reporting Act, 15 U.S.C. §1680 et seq., presents an important pronouncement of Federal Law and has not been interpreted by this Court, and the issue should be settled by this Court; (b) there is a conflict in the decisions of the various circuits covering the definition of consumer reporting agencies, the statutory standard of "maximum possible accuracy", and the requirement of advising consumers of their right for an up-date to all businesses who received disputed information on the issues of i) completeness and ii) accuracy; and c) the decision of the lower courts is in direct contravention of the F.T.C.'s Compliance Pamphlet, 4 CCH, Consumer Credit Guide, which is statutorily mandated by the Fair Credit Reporting Act, 15 U.S.C. §1680

et seq., to guide businesses in complying with the Act.

FEDERAL PROVISIONS INVOLVED

Fair Credit Reporting Act, 15 U.S.C. §1681 a(d):

> "The term 'consumer report' means any written, oral or other communication of any information... bearing on a consumer's credit worthiness, credit standing, credit capacity...."

Fair Credit Reporting Act, 15 U.S.C. §1681 a(f):

> "The term "consumer reporting agency' means any person [person = corporation, 15 U.S.C. §1681 a(b)] which...on a cooperative basis regularly engages...in part in the practice of assemblying...consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports."

Fair Credit Reporting Act, 15 U.S.C. §1681 (b):

> "It is the purpose of this sub-

chapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of consumer credit...which is fair and equitable to the consumer with regards to the... accuracy....of such information."

Fair Credit Reporting Act, 15 U.S.C. §1681 e(b):

"Whenever a consumer reporting agency prepares a consumer report, it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about when the report relates."

Fair Credit Reporting Act, 15 U.S.C. §1681 i (a) and (d):

"(a) If the completeness or accuracy of any item of information in his file is disputed by a consumer... the consumer reporting agency shall... re-investigate and record the correct status of that information...

* * *

"(d) Following...any notation as to disputed information, the consumer reporting agency shall, at the request of the consumer, furnish notification that the item has been deleted, or the statement codification or summary...[heretofore filed be given]...to any person..who has... within six months prior thereto

received a consumer report... The consumer reporting agency shall clearly and conspicuously disclose to the consumer his right to make such a request."

Federal Trade Commission's Compliance Pamphlet, 4 CCH, Consumer Credit Guide, Paragraph 11, 30 6 (c) (2):

"Accuracy
The obligation to assure accuracy applies to all aspects of the handling of consumer information... The requirement in law that steps be taken to promote accuracy also requires periodic re-evaluation of data to determine whether it has become obsolete or misleading with the passage of time."

STATEMENT OF THE CASE

a.) Procedural History of Case

Plaintiffs filed a Complaint against the Defendants under the Fair Credit Reporting Act, 15 U.S.C. §1680 et seq. Depositions were taken on July 8, 1976 and October 6, 1976. Plaintiffs and Defendants filed cross motions for summary judgment. On September 9, 1977, the United States

District Court, Eastern District of Pennsylvania filed an Order and Opinion granting Defendants' Motion For Summary Judgment and denying Plaintiffs' Motion For Partial Summary Judgment. On or about September 23, 1977, the Plaintiffs filed a timely appeal from said Order to the United States Court of Appeals, Third Circuit. On June 6, 1978, the United States Court of Appeals, Third Circuit, affirmed this judgment of the lower court on the Opinion and Order of the lower Court. Plaintiffs thereafter filed their timely Petition For Writ of Certiorari which is now before this Court for disposition.

b.) Facts of the Case

On July 26, 1971, Plaintiff, Alice Todd, applied for credit at Defendant, Hess's, Inc. (hereinafter, "Hess's"), by filling out a written credit application. (Deposition of Ruth M. Rohrbach [hereinafter "Rohrbach"], p. 8). In processing

Plaintiffs' credit application, Defendant, Hess's, obtained credit information on Plaintiffs from the Bethlehem Credit Bureau, Allentown Credit Bureau (predecessor in interest to the Defendant, Associated Credit Bureau Services, Inc., [hereinafter "Associated"], Rohrbach, p. 15) and directly from a finance company and Sears (Rohrbach, p. 10-12). Plaintiffs' credit application at Defendant, Hess's was approved on August 11, 1971, (Rohrbach, p. 16).

Defendant, Hess's, closed the Plaintiffs' account on July 31, 1972 at which time the balance owed was $1,182.44 (Rohrbach, p. 20, Exhibit No. 1). The high balance owed Defendant, Hess's for the life of the account was reached in October, 1972, and was $1,227.20 (Rohrbach, Exhibit No. 1).

Thereafter, Defendant, Hess's, pur-

sued collection of these funds by engaging Defendant, Associated's collection service in January, 1973. This service was provided the Defendant, Hess's, by the Defendant, Associated, in accordance with their contract which established a quid pro quo relationship between the two parties; to wit, Defendant, Hess's, supplies credit information to Defendant, Associated, from its own credit files, and in exchange, Defendant, Associated, supplies credit information to Defendant, Hess's, and further provides a letter service to Defendant, Hess's, to assist in collecting delinquent accounts. As part of this contract between Defendant, Hess's, and the Defendant, Associated, Associated Credit Bureau duly sent three (3) dun or collection letters to the Plaintiffs (Rohrbach, p. 22).

In August of 1973, the Plaintiffs

account was turned over to Defendant, General Credit Control, Inc. (hereinafter "General") for collection with the Defendant, General, acting as agent for the Defendant, Hess's, and Defendant, General, being aware that the Defendant, Associated, was advised that the account was delinquent.

As Defendant, General, received payments from the Plaintiffs, the monies, less commission, were forwarded to the Defendant, Hess's, to be applied to the account (Rohrbach, p. 29,32). The delinquent account was paid in full in the following payment schedules:

September, 1973	- $ 50.00
November, 1973	- 150.00
January, 1974	- 150.00
March, 1974	- 100.00
May, 1974	- 75.00
July, 1974	- 50.00
September, 1974	- 652.00

(Rohrbach, Exhibit NO.1)

For purposes of the instant case, it is important to note that the account was

paid in full in September of 1974 (Rohrbach, Exhibit No. 1).

Notwithstanding that the Plaintiffs' account with the Defendant, Hess's, was paid in full in September of 1974, and as early as September, 1973, the balance had been steadily reduced from $1,227.20, Defendant, Associated, continued to report the Hess's balance due at $1,227.20 on Plaintiffs' credit report up to November, 1975. (Deposition of Ronald C. Smith [hereinafter "Smith"], p. 29).

Defendant, Associated, supplied this misleading erroneous and stale credit information to the following businesses:

December 17, 1974 - to Sears Roebuck and Company

October 20, 1975 - to Merchants National Bank of Allentown

October 27, 1975 - to Diana Shops

November 14, 1975 - to Kern's Furniture

(Smith, p. 45; Deposition of

Randall Skeath, [hereinafter, "Skeath"), p. 134)

As a result of Defendant, Associated's, misleading, stale and erroneous credit reports, Plaintiffs were denied credit at a time of acute financial need at Merchants National Bank of Allentown for financing the purchase of a much needed new automobile and also at Sears, Roebuck and Company for the purchase of a microwave oven for a Christmas present (Deposition of Edgar C. Todd, Jr., [hereinafter "E. Todd"], p. 44-52; deposition of Alice Todd [hereinafter "A. Todd"], p. 82-84). These episodes were all the more tragic for Plaintiffs inasmuch as their young daughter suffered from a serious ailment which required open heart surgery in Philadelphia. The new automobile was needed to transport the girl to Philadelphia and to enable Plaintiffs to visit her regularly during the expected long convalescent period. The microwave oven was planned as a Christ-

mas gift from the sick daughter and the father of the Plaintiff, Alice Todd, as part of holiday preparations and celebration. At a time of heartbreak and worry, Plaintiffs' pain was aggravated by the erroneous credit reports which meant Plaintiffs could not get the new automobile and the sick daughter's hope for a Christmas present for her mother was darkened. (E. Todd, p. 44-52).

Plaintiffs belatedly learned of the unwarranted source of their credit difficulties after applying for credit at Kern's Furniture on November 13, 1975. The Todds received a call from Kern's informing them that Defendant, Associated's credit report reflected an unpaid balance at Defendant, Hess's. Mrs. Todd called Defendant, Associated, that, in fact, the Hess's account had been paid in full. Defendant, Associated, contacted Defendant, Hess's, and

then reported back to the Plaintiffs that the Defendant, Hess's, was uncooperative, and was not corroborating Plaintiffs' claim of full payment of the debt (A. Todd, p. 88; Skeath, p. 135). Eventually, Defendant, Associated, was able to correct the credit report upon learning that the facts were as reported by Plaintiffs (A. Todd, p. 88; Smith, p. 55; Skeath, p. 138).

At the interview between Defendant, Associated, and the Plaintiffs, Todds, the Associated Credit Bureau failed to notify the Todds as required by the Fair Credit Reporting Act that the Todds had the right to have the misleading, stale and erroneous information corrected, and that the Todd's had the right to require the Defendant, Associated, to give corrected information to people who inquired over the past six months, including Kern's. The only correction given by Defendant, Associated, was to

Kern's because the Plaintiffs specifically asked the Defendant, Associated, to contact Kern's since Kern's requested that Plaintiffs have Associated supply them with an up-dated corrected credit report. (A. Todd p. 96, 97; Skeath, p. 137,138).

Interestingly, the evidence suggests other negligence by the Defendant, Associated, in that Associated Credit Burean's credit report on Plaintiffs contained other unexplained errors. It indicated that the last sale date from Defendant, Hess's to Plaintiffs was June, 1972, while at the same time indicating that the account was not opened with Hess's by the Todds until January of 1973. (Smith, p. 34,35). Also, the credit report indicated that the account was delinquent since April, 1969, at Thorton's Jewelers while at the same time indicating that the Thorton account was not opened until

November of 1970. (Smith, p. 59).

During the course of this litigation, Associated has repeatedly argued that the information it related was "accurate." (Paragraph 1 of Motion Of Associated For Summary Judgment.) Plaintiffs have always contested the claim of alleged accuracy as follows:

> "The report on the Todds was not accurate. By virtue of the failure of Associated to advise merchants that the amounts turned over to collection and charged to profit and loss were subsequently paid, merchants receiving this partial information, consistent with Trade practice, interpreted such reports to mean the amounts were still unpaid when, in fact, the amounts were fully paid. Accordingly, Associated's claim of accuracy is untrue."
>
> (Plaintiffs' Answer To Motion of Associated For Summary Judgment)

The factual basis for this assertion is found in the testimony of Randall Skeath, the credit manager of Kern's Furniture Store, who initially denied credit to the

Plaintiffs upon receiving the information from Associated:

> Q. And, then department store open 1/73, and the last report of June, "74, $1,227 balance past due, balance same, charged to profit and loss. And, what does that tell you?
>
> A. That the department store charged off their account of $1,227 to profit and loss.
>
> Q. And, the balance was still owed them?
>
> A. Right.
>
> (Skeath, p. 134)
>
> * * * *
>
> Q. And, what was your conversation, would you tell us?
>
> A. Well, I called the Todds, and Mrs. Todd answered. And, I told her that we could not deliver the furniture to them because we had received a bad credit report from the credit bureau.
>
> (Skeath, p. 136)
>
> A. ...and, I said we couldn't deliver it until the credit bureau gave us a report that it was -- that it (the department store) was paid.
>
> (Skeath, p. 137)

> A. ...They (Associated) notified us that the department store had been taken care of, which was our main concern...
>
> (Skeath, p. 138)
>
> A. ...(Associated) told us that the amount had been taken care of, that they had changed the credit report.
>
> (Skeath, p. 139)

On this record, the lower court found as a fact and as a matter of law that the information, as furnished by Associated, was accurate:

> "Because the report is not inaccurate, I must conclude, in accordance with Middlebrooks, that the Todds cannot sustain their cause of action."
>
> (Opinion, p. 3)
>
> * * * *
>
> "Upon the finding that Associated reported accurate information, the Todds' secondary claim for relief under 15 U.S.C. §1681 i (d) must also fail... Once again, I must state that the Todds' consumer report contained no inaccurate information."
>
> (Opinion, p. 4)

In understanding the relationship among

the three Defendants, it must be remembered that the Defendant, Associated, is a voluntary association of members of local businesses that supply consumer credit. The Defendant, Hess's, is a member of the association, and as such, a component part of Defendant, Associated. Defendant, Associated, is admittedly in the business of credit reporting. (Smith, p. 4). When Defendant, Associated, was established in 1928, Defendant, Hess's was the second business to join, but subsequently cancelled its membership in order to obtain more favorable membership rights. In 1970 or 1971, Defendant, Hess's, rejoined Defendant, Associated, as a member. (Smith, p. 36). One of the reasons Defendant, Hess's, left Defendant, Associated, was because of the inconvenience of the numerous requests Defendant, Associated, was making upon Defendant, Hess's, for credit information,

and Defendant, Hess's, did not feel that bilateral relationship of consumer credit exchange information was to its benefit. (Rohrbach, p. 51).

In 1973, Defendant, Associated, and Defendant, Hess's, renegotiated their contractual relationship, and the parties entered into a bilateral contract between the parties which provides for the reciprocal exchange of credit information. (Rohrbach, p. 38-40; Rohrbach, Exhibit No. 2). The contract provides for a dunning letter service, actually used by Defendant, Hess's, in attempting to collect the Plaintiff's delinquent account, and it further indicates that, after the Defendant, Associated, received an open account from the Defendant, Hess's, Defendant, Hess's would provide follow-up information:

> "Follow-up information as to when payment in full of the past due balance has been received by Hess's will be

forwarded to the bureau (Defendant, Associated), whenever possible."

(Rohrbach, Exhibit No.2)

In fact, even though Plaintiffs' delinquent account was paid in full by September of 1974, Defendant, Hess's failed to do so until this stale, misleading and erroneous information was reported to four local businesses with adverse consequences to Plaintiffs and until November of 1975 (fifteen months after full payment) when Plaintiffs made an issue of the accuracy of their credit report after learning for the first time from Kern's Furniture that Defendant, Associated, was still telling local businesses that Plaintiffs' account with the Defendant, Hess's was still delinquent. (Rohrbach, p. 48-52). This was consistent with Defendant, Hess's policy not to ever up-date consumer reports:

Q. Now, who in your department--I take it it's your department,

these 60 or 70 girls that you have--would be responsible for notifying the credit bureau that payment in full of the past due balance had been received?

A. We have no one responsible to do that.

Q. You have no one assigned to do that?

A. Well, we don't do it.

Q. You don't do it?

A. No.

(Rohrbach, p. 45)

Furthermore, the evidence conclusively establishes that the Defendant, Associated never contacted Hess's to verify the accuracy of its credit reports or to up-date information on past-due accounts. (Smith, p. 75). The Defendant, Associated simply does not utilize any operating procedure whereby it up-dates information on any consumer reports on a periodic basis, (Smith, p. 68,69), and the Defendant, Hess's, for its part, made a policy decision that it would never up-date informa-

tion it supplied to the Defendant, Associated. The Plaintiffs became caught in the web of inaction decided by the Defendants, Associated and Hess's. Defendant, Hess's never gave Defendant, Associated up-dated information, and the Defendant, Associated was not going to take the initiative to obtain up-dated information from the Defendant, Hess's. This inaction on up-dating accounts is uncontested despite the fact that the evidence indicates the parties exchanged credit information almost daily, and that the Defendant, Associated contacted the Defendant, Hess's, by telephone at least six times per day on new accounts. The Defendant, Hess's admitted that given this informal arrangement, it was questionable whether accurate records were kept on this type of telephone connumication. (Rohrbach, p. 52-56). In other words, despite the requirements of the Fair Credit

Reporting Act, the parties wholly neglected to provide any mechanism for up-dating credit reports when it was favorable to the consumer.

Defendant, General, as agent for the Defendant, Hess's, was aware of the relationship between Defendants, Hess's and Associated, and as agent for Hess's, never up-dated the information to Defendant, Associated when it obtained the monies from Plaintiffs. (Affidavit of Shatsky). The lower court, however, found no liable of Hess's or General in that the Court concluded that neither was a credit reporting agency within meaning of the action. (Opinion, 2). The United States Court of Appeals, Third Circuit affirmed on this Opinion and Order of the lower court.

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER OR NOT THE DEFENDANTS ARE "CONSUMER REPORTING AGENCIES" WITHIN MEANING OF THE FAIR CREDIT REPORTING ACT, 15 U.S.C. §1680 et seq., WHERE THE UNCONTRADICTED EVIDENCE ESTABLISHES THAT ONE OF THE DEFENDANTS ACTS AS A CONSUMER REPORTING AGENT, THE SECOND, A DEPARTMENT STORE, ACTS IN A COOPERATIVE EXCHANGE OF INFORMATION WITH THE CONSUMER REPORTING AGENCY, AND THE THIRD ACTS AS AGENT OF THE DEPARTMENT STORE IN THE COOPERATIVE EXCHANGE OF INFORMATION?

II. WHETHER OR NOT THE DEFENDANTS ACTED NEGLIGENTLY AND WILLFULLY IN FAILING TO FOLLOW REASONABLE PROCEDURES TO ASSURE MAXIMUM POSSIBLE ACCURACY AS REQUIRED BY 15 U.S.C.§1681 e(b) AND 15 U.S.C.§1681 (b) BY REPORTING STALE AND MISLEADING INFORMATION CONCERNING PLAINTIFFS BY REPORTING TO THE BUSINESS COMMUNITY A BALANCE OWED WHEN, IN FACT, THE BALANCE HAS BEEN FULLY PAID?

III. WHETHER OR NOT CONSUMER REPORTING AGENCIES ARE MANDATED TO ADVISE CONSUMERS THEIR RIGHT TO REQUEST UPDATES TO ALL BUSINESSES WHO RECEIVED DISPUTED INFORMATION WHERE THE INFORMATION IS INCOMPLETE AND INACCURATE?

ARGUMENT

I. WHETHER OR NOT THE DEFENDANTS ARE "CONSUMER REPORTING AGENCIES" WITHIN MEANING OF THE FAIR CREDIT REPORTING ACT, 15 U.S.C. §1680 et seq., WHERE THE UNCONTRADICTED EVIDENCE ESTABLISHES THAT ONE OF THE DEFENDANTS ACTS AS A CONSUMER REPORTING AGENT, THE SECOND, A DEPARTMENT STORE, ACTS IN A COOPERATIVE EXCHANGE OF INFORMATION WITH THE CONSUMER REPORTING AGENCY, AND THE THIRD ACTS AS AGENT OF THE DEPARTMENT STORE IN THIS COOPERATIVE EXCHANGE OF INFORMATION?

The first issue which this Court must answer is whether or not the Defendants, individually, jointly, or severally, are "consumer reporting agencies" as defined by the Fair Credit Reporting Act, 15 U.S.C. §1680 et seq.

The definition of "consumer reporting agency" is defined at 15 U.S.C. §1681 a(f):

> "The term 'consumer reporting agency' means any person (person-corporation, 15 U.S.C.§1681 a[b]) which...on a cooperative basis regularly engages...in part in the practice of assemblying... consumer credit information or other information on consumers for the purpose of furnishing

> consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports."

"Consumer report" is defined in the Fair Credit Reporting Act, 15 U.S.C.§1681 a(d) as follows:

> "The term 'consumer report' means any written, oral or other communication of any information... bearing on a consumer's credit worthiness, credit standing, credit capacity...."

Against these statutory definitions, the facts of the instant case must be examined.

1. Associated Credit Bureau Services, Inc. admitted in the pleadings that it is a "consumer reporting agency". At paragraph 7 of its Answer To Plaintiffs' Complaint, the Defendant, Associated admitted that it is a "consumer reporting agency". Furthermore, at paragraph 8 of its Answer, the Defendant, Associated admitted that it issued consumer reports concerning the

Plaintiffs. On this stage of the record, the Defendant, Associated is admittedly a consumer reporting agency which issued consumer reports concerning the Plaintiffs.

2. The Defendant, Hess's suggested in its Answer, and the evidence establishes that Hess's acted as a consumer reporting agency in the case at bar. In its Answer filed with the Court, the Defendant, Hess's did not allege that it was not a consumer reporting agency. On the contrary, the Defendant, Hess's suggested to the Court that it complied with the Fair Credit Reporting Act as required by the statute. (See, Fourth and ninth defenses). It is only in Defendant, Hess's Motion For Summary Judgment and Brief in Support thereof that it first argued that it is not a consumer reporting agency.

In order to establish that the Defendant, Hess's is a "consumer reporting

agency", Plaintiffs must produce evidence which meets the elements of the statutory definition as follows:

> "Hess's is a corporation which... on a cooperative basis (with Associated Credit Bureau Services, Inc.) regularly engages... in part in the practice of assembling... consumer credit information on consumers (and the Plaintiffs) for the purpose of furnishing consumer reports to third parties, (including Associated Credit Bureau Services, Inc.) and which uses any means or facility of interstate commerce (such as, telephones and U.S. mails) for the purpose of preparing or furnishing consumer reports."

It is respectfully submitted that the evidence fits the Defendant, Hess's into this statutory category on the facts of the instant case.

The Defendants, Hess's and Associated, cited a combined total of three cases on the question of who is a "credit reporting agency". The holding of those cases must be carefully examined by the Court:

Porter v. Talbot Perkins Children Services, 355 F. Supp. 174 (S.D., N.Y., 1973): held that adoption agencies are not consumer reporting agencies against whom prospective adoptive parents have a claim under the Fair Credit Reporting Act because their application for adoption was rejected;

Bellshaw v. Credit Bureau of Prescott et al, 392 F. Supp. 1356 (D.Org., 1975): held that a law firm is not a consumer reporting agency; and

Peller v. Retail Credit Corp., et al 359 F. Supp. 1235 (N.D.,Ga., 1973) affirmed without opinion 505 F.2d 733 (5th Cir, 1974): held that an employer who requests a polygraph test and a firm that administers it is not a consumer reporting agency.

Plaintiffs have no serious objection to the

holding in the aforementioned three cases. Plaintiffs do, however, vigorously object to the attempt to stretch the dicta of those three cases to immunize the Defendants, Hess's and General.

As indicated in the legislative history of the Fair Credit Reporting Act, 1970 U.S. Cong. Quar. and Adm. News, Pub. L. 91-508, p. 4414, the exception was intended to be limited to banks who relay consumer reports information solely because of a specific request by a business investigating a consumer for credit:

> "The House conferees also intend that the definition of 'consumer reporting agency' not include financial institutions whose lending officers merely relate information about an individual with whom they have had direct financial transactions."

As indicated in Beresh v. Retail Credit Co., Inc., et al, 358 F. Supp. 260 (C.D.,Cal., 1973), a life insurance company becomes a consumer reporting agency when it acts in concert with a credit bureau disseminating information which bears on the consumers' credit worthiness. Again, in Hansen v. Morgan, et al, 405 F. Supp. 1318 (D.Idaho, 1976), retail merchants who are members of a credit reporting bureau and use the services of such bureaus become a credit reporting agency within meaning of the Fair Credit Reporting Act.

The test for deciding whether or not a business is a credit reporting agency was succintly stated by the Court in Greenway v. Information Dynamics, Inc. 399 F. Supp. 1092, affirmed 524 F.2d 1145 (5th Cir, 1975), cert denied 424 U.S. 969 (1975):

> "When an agency disseminates information bearing on any of the seven characteristics of a consumer listed in §1681 a(d) to a third party, and the agency knows and expects that it will be used 'in connection with a business transaction involving the consumer', then that information is a 'consumer report' and its originator is a 'con-

sumer reporting agency'."

399 F. Supp. at 1095

Defendant, Hess's points out that "...when a firm gives its own credit experience on a consumer to a credit bureau, that information does not constitute a consumer report..." according to the F.T.C. 'compliance pamphlet."[1] Assuming the correctness of that view, the evidence in the instant case establishes more than Defendant, Hess's merely unilaterally relating information on individuals with whom it had direct financial transactions. On the contrary, the evidence conclusively establishes a bilateral relationship

[1]It is respectfully pointed out that the F.T.C. does not have rule making power under the F.C.R.A. and that its opinions are not binding on the Court. Foer, What Every Lawyer Should Know About Consumer Reports 61 A.B.A.J. 857 (1975).

between Defendants, Hess's and Associated, with a contractual relationship involving detailed exchange of information as the quid pro quo of the contract, and with Defendant, Hess's, being a member--a component part--of Defendant, Associated. Such joint action between Defendants, Hess's and Associated, qualifies Defendant, Hess's as consumer reporting agencies under Beresh v. Retail Credit Co., Inc., supra, and Hansen v. Morgan, supra. Furthermore, as a member of Associated Credit Bureau Services, the Defendant, Hess's became the originator of consumer reports which it knew would be disseminated by Defendant, Associated, to all interested members, and it further knew it would be used in connection with a business transaction involving the Plaintiffs. As such, it meets the test of Greenway v. Information Dynamics, Inc, supra.

In the final analysis, the question which this Court must ask is whether or not the evidence fits Defendant, Hess's into the statutory definition of "consumer reporting agency" under the Fair Credit Reporting Act, 15 U.S.C.§1681 (f). The Plaintiffs request that this Court dissect the definition into its minumum component parts:

1. Is Hess's a corporation?

   PROPOSED ANSWER: Yes.

   (Admitted in its Answer)

2. Did Hess's act on a cooperative basis with Associated?

   PROPOSED ANSWER: Yes.

   (The contract defines the cooperative relationship, and the evidence establishes daily cooperation between the two entities.)

3. Did Hess's, in part, assemble consumer credit information on Plaintiffs and other consumers?

   PROPOSED ANSWER: Yes.

   (The affidavit of Stephen J. Furst, Vice President, admits

the compliates of such information).

4. Did Hess's furnish such consumer reports to third parties?

   PROPOSED ANSWER: Yes.

   (The contract between the parties and the actual practice indicates that it was communicated to Defendant, Associated, with the knowledge that it would be disseminated to all members of the association.)

5. Did Hess's use telephones and the mails in relaying such information?

   PROPOSED ANSWER: Yes.

   (Depositions of Rohrbach indicates constant use of the mails and telephones in relaying such information.)

To affirm the opinion given by the lower court would be to emasculate the requirements of the Fair Credit Reporting Act. In essence, Defendant, Hess's argues that it ought to be allowed to act as a consumer reporting agency by becoming a member of the credit bureau, and then be totally absolved from the requirements of the Act,

regardless of how irregular its procedures and regardless of how inaccurate its information. It is respectfully submitted that the legislators envisioned such a ruse when drafting the Act and included "co-operative" exchange of information as meeting the test for being a "consumer reporting agency".

It is respectfully submitted that the Defendant, Hess's is a "consumer reporting agency" under the Fair Credit Reporting Act.

3. <u>The Defendant, General, acted as agent for Defendant, Hess's forming the third arm of the cooperative triangle of Associated - Hess's - General</u>. Defendant, General concedes that it was acting in its capacity as an independent contractor as agent for the Defendant, Hess's. The question before this Court is whether or not this agency relationship is sufficient

to make Defendant, General liable as agent of a consumer reporting agency for failure to report to Defendant, Associated, that the Plaintiffs' delinquent account was paid in full.

In this regard, the case of <u>Wood vs. Holiday Inns, Inc.</u> 508 F.2d 167 (5th Cir, 1975) is significant. The case involved five parties: Gulf Oil Company, Holiday Inns, Inc., Data Bank, franchisee of Holiday Inns, Inc, and the motel clerk. There, the Court held that Gulf Oil Company was not acting as a consumer reporting agency when it revoked and confiscated Wood's credit card by the motel clerk which was being used at a Holiday Inn, Inc., franchise, but further held that Gulf could be liable under the statute inasmuch as Data Bank was a consumer reporting agency who was acting as a consumer reporting agency, and further the

motel clerk became a sub-agent or sub-employee of Gulf for purposes of confiscating the card from which Gulf would ultimately be liable. In reaching this result, the Court specifically indicated that the agency principles were applicable under the statute.

In the case at bar, Defendant, General, voluntarily joined Defendant, Hess's while it was acting as a consumer reporting agency. First, Defendant, Associated sent dunning letters. Then, when that failed, Defendant, General took over. Given this posture, the Defendant, General as agent for Defendant, Hess's became obligated to advise the Defendant, Associated, that it received full payment on Plaintiffs' delinquent account. Its failure to do so makes Defendant, General liable to Plaintiffs as agent for Defendant, Hess's with full knowledge that Defendant, Associated

was carrying the account as delinquent even though Defendant, General, obtained full payment.

II. WHETHER OR NOT THE DEFENDANTS ACTED NEGLIGENTLY AND WILLFULLY IN FAILING TO FOLLOW REASONABLE PROCEDURES TO ASSURE MAXIMUM POSSIBLE ACCURACY AS REQUIRED BY 15 U.S.C.§1681 e(b) AND 15 U.S.C.§1681(b) BY REPORTING STALE AND MISLEADING INFORMATION CONCERNING PLAINTIFFS BY REPORTING TO THE BUSINESS COMMUNITY A BALANCE OWED WHEN, IN FACT, THE BALANCE HAS BEEN FULLY PAID?

1. Liability under the Fair Credit Reporting Act, 15 U.S.C.§§1681 e(b): 1681 i(d); and 1681 (b) is for negligently or intentionally failing to follow reasonable procedures assuring maximum possible accuracy. The standard of care required by consumer reporting agencies under the Fair Credit Reporting Act is as follows:

> "Whenever a consumer reporting agency prepares a consumer report, it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about when the report relates."

15 U.S.C. §1681 e(b)

This is in keeping with the stated Congressional purpose of the Act:

> "It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of consumer credit... which is fair and equitable to the consumer with regards to the... accuracy....of such information."

15 U.S.C. §1681 (b)

Once the consumer reporting agency realizes that it has erred, it must notify the consumer that he has the right to demand that notification of such an error be made to all parties who previously received the erroneous information in the past six months:

> "Following any deletion of information which is found to be inaccurate...the consumer reporting agency, at the request of the consumer, must furnish notification...to any person specifically designated by the consumer who has...within the past six months prior thereto received a consumer report...
>
> <u>The consumer reporting agency shall clearly and conspicuously disclose to the consumer his right to make such a request.</u>"

15 U.S.C.§1681 i(d)

In <u>Millstone v. O'Hanlon Reports, Inc.</u> 383 F.Supp. 269 (D.C. Mo.,1974), affirmed 528 F.2d 829 (8th, 1976), the Court held that where the evidence indicates that the consumer reporting agency did "nothing" by way of follow-up to verify the accuracy of its information, such <u>inaction</u> is so reprehensible to justify not only actual but punitive damages under 15 U.S.C. §§1681 n, 1681 o. Contra: <u>Middlebrooks v. Retail Credit Company</u> 416 F. Supp. 1013 (N.D., Ga, 1976); <u>Austin v. Bankamerica Service Corp.</u> 419 F. Supp. 730 (N.D. Ga, 1974); <u>Peller v. Retail Credit Company</u> 505 F.2d 733 (5th Cir, 1974); <u>Roseman v. Retail Credit Co., Inc.</u> 428 F. Supp. 643 (E.D. Pa, 1977).

In the case at bar, the undisputed facts indicate the same type of "inaction" that the Court found so reprehensible as in Millstone v. O'Hanlon Reports, Inc., supra. The Defendant, Associated obtained information that Plaintiffs' account was delinquent and turned over to collection, and then for years, Defendant, Associated did nothing to see if that information remained accurate. Defendant, Associated, admitted that it does not even have any type of operating procedure to follow-up on checking the continued accuracy of the account. This, however, did not stop them from carrying and reporting the account as delinquent.

The Defendant, Hess's obtained all monies owed by Plaintiffs, and were obligated by contract to report this fact to Defendant, Associated. Yet, Defendant, Hess's who was quick enough to report the

account as delinquent, did nothing to tell Defendant, Associated that the account was paid in full. Again, the Defendant, Hess's admitted that it, as a matter of operating policy, does not report back to Defendant, Associated, once it gets paid in full.

Similarly, the Defendant, General obtained the monies---and its commission---and then did nothing to see that Defendant Associated, was advised that the account was now paid in full.

Even after the Defendants were made aware of their errors, no one--not Associated, Hess's or General--advised the Plaintiffs that they had a right to have all persons who received notice of the error in the past six months to receive notice of the correction. It was only because of Plaintiffs' insistence that Defendant, Associated notified Kern's

Furniture alone of the truth.

The case of liability is clear and unequivocal. The statute requires "...reasonable procedures to assure maximum possible accuracy....". The fact is that all Defendants are culpable of total inaction to assure an up-date on Plaintiffs' account. Consequently, Plaintiffs' Motion For Partial Summary Judgment on the issue of liability is proper.

2. <u>The information on the Todds was stale, misleading, and inaccurate</u>. The lower court found as a matter of fact and as a matter of law that the report was accurate. That result can only flow by isolating the report from the reality of the actual trade practice, and the meaning of the words as used in the trade.

Associated reported that the account reached a high balance of $1,200.00 in October of 1972; that Hess's charged the debt to profit and loss; and that Hess's placed the account for collection. According to Randall Skeath, credit manager of Kern's Furniture, that meant that the bill remained unpaid on November 14, 1975 even though the reality was that the bill was paid in full in September of 1974. Furthermore, when Skeath learned that the bill was paid, Kern's Furniture reversed itself and gave the Plaintiffs the requested credit. Accordingly, it must be concluded that the information as given by Associated to third parties, including Kern's Furniture, was inaccurate under prevailing trade practices because advising merchants that the amounts turned over to collection and charged to profit and loss means that the bill remains unpaid, and that the merchants lost money on their dealings with the creditors.

2. <u>Under the F.T.C.'s Compliance</u>

Pamphlet, stale or misleading information is inaccurate information. The Fair Credit Reporting Act, 15 U.S.C.§1681 c(a)(4) puts an outside parameter of seven (7) years on all information, no matter how accurate it might otherwise be. The seven (7) year parameter for obsolete information, however, does not mean that stale and misleading information can be reported, without up-dates, so long as it is less than seven (7) years of age. The requirement of re-evaluation and up-dating of stale information is clearly spelled out in the F.T.C.'s Compliance Pamphlet:

> "Accuracy
> The obligation to assure accuracy applies to all aspects of the handling of consumer information.. The requirement in law that steps be taken to promote accuracy also requires periodic re-evaluation of data to determine whether it has become obsolete or misleading with the passage of time."
>
> 4 CCH, Consumer Guide, Paragraph 11, 306(c)(2)

That is precisely where the Defendants ran afoul of the Act. Follow-up information was part of the contractual arrangebetween Hess's and Associated. Obviously, both were aware of the significance of the passage of time on consumer information. A bill that is one day a large debt becomes the next day a plus mark for the consumer where it is paid in full. The data must be re-evaluated--and up-dated--in order to be accurate. Remember, the statute requires more than accuracy. The statutory standard is one of "maximum accuracy". Yet that was not done in the case at bar, and for over a year, a bill that had been paid in full was reported as a debt because no follow-up was done, and the stale information was misleading because of the passage of time.

III. WHETHER OR NOT CONSUMER REPORTING AGENCIES ARE MANDATED TO ADVISE

CONSUMERS THEIR RIGHT TO REQUEST UP-DATES TO ALL BUSINESSES WHO RE-CEIVED DISPUTED INFORMATION WHERE THE INFORMATION IS INCOMPLETE AND INACCURATE?

The Plaintiffs testified, and the Court found that Associated failed to advise the Plaintiffs of their right to have all businessmen who received the disputed information of an up-date of their file as required by 15 U.S.C.§1681 i (d). Again, the Court noted that accuracy is the touchstone for activating their rights. It is respectfully submitted that, under 15 U.S.C.§1681 i (a) and (d), the statutory right to be advised that all businesses who received previously disputed information can be forwarded an up-date of the file is broader than the reporting merely inaccurate information:

> (a) If the <u>completeness</u> or accuracy of any item of information in his file is disputed by a consumer..., consumer reporting agency shall...re-investigate and record the current status of that information...
>
> * * * *
>
> (d) Following...any notation as to disputed information, the consumer reporting agency shall, at the request of the consumer, furnish notification that the item has been deleted, or the statement codification or summary... (heretofore filed be given).. to any person...who has... within six months prior thereto received a consumer report...<u>The consumer reporting agency shall clearly and conspicuously disclose to the consumer his right to make such a request.</u>

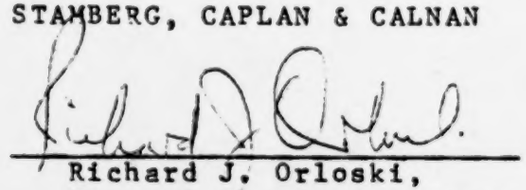
Under terms of the statute, any dispute regarding completeness as well as accuracy is expressly covered by the statute, and the consumer reporting agency must clearly and conspicuously disclose to the consumer his right to request that any business who received the <u>disputed</u> information be given an up-dated version of the account. Inasmuch as the Court found as

a fact that the consumer reporting agency failed to give Plaintiffs this required disclosure of their rights, and inasmuch as the statutory right encompasses completeness as well as accuracy, the Court erred as a matter of law on Plaintiffs' secondary claim under 15 U.S.C.§1681 i(d) by holding that accuracy was synonomous with completeness, and judgment on the issue of liability must be entered in favor of Plaintiffs.

CONCLUSION

For the foregoing reasons, the Petition For Writ Of Certiorari must be granted.

STAMBERG, CAPLAN & CALNAN



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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 77-2400

EDGAR TODD, JR. and ALICE TODD,

Appellants

vs.

ASSOCIATED CREDIT BUREAU SERVICES, INC., GENERAL CREDIT CONTROL, INC., and HESS'S INC.,

---

Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil No. 76-1456)

Submitted Under Third Circuit Rule 12(6)
June 6, 1978
Before: ALDISERT, ROSENN and HUNTER
Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellants, and for the reasons

EXHIBIT "A"

set forth in the district court opinion by the Honorable Joseph L. McGlynn, Jr., ____ F.Supp. _____(E.D. Pa 1977), it is

ADJUDGED AND ORDERED that the judgment of the District Court be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

S/Ruggero J. Aldisert
Circuit Judge

Attest:

S/Thomas F. Quinn, Clerk

Dated: June 6, 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDGAR TODD, JR. and ALICE TODD,	:	CIVIL ACTION NO. 76-1456
vs.	:	
ASSOCIATED CREDIT BUREAU SERVICES, INC., GENERAL CREDIT CONTROL, INC., and HESS'S, INC.,	:	

O R D E R

AND NOW this 9th day of SEPTEMBER, after a hearing and upon consideration of the briefs and arguments of counsel, it is hereby

ORDERED that the defendants' motions for summary judgment be and the same are hereby GRANTED.

It is further

ORDERED that the plaintiffs' motion for partial summary judgment be and the

EXHIBIT "B"

same is hereby DENIED.

It is further

ORDERED that Judgment be entered in favor of the defendants and against the plaintiffs.

BY THE COURT:

S/Joseph L. McGlynn, Jr.
J

FILED SEPTEMBER 9, 1977

ENTERED: 7/13/77

CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDGAR TODD, JR. and ALICE TODD,	:	
	:	CIVIL ACTION
v.	:	NO. 76-1456
ASSOCIATED CREDIT BUREAU SERVICES, INC., GENERAL CREDIT CONTROL, INC., and HESS'S, INC.	:	

MEMORANDUM OF DECISION

Plaintiffs bring this action against the three defendants, Hess's, Inc. [Hess's] General Credit Control, Inc., [General], and Associated Credit Bureau Services, Inc., [Associated], alleging that each committed violations of the Fair Credit Reporting Act.[1] No material facts are controverted and all parties have filed motions for summary judgment. After a thorough examination of the arguments for both sides, I must conclude that the defendants

[1] 15 U.S.C. §1681 et seq.

have not violated the Act. Therefore, I shall grant summary judgment in favor of all defendants. The facts follow.

In October, 1972, the plaintiffs' account with Hess' reached a high balance in excess of $1,200.00. Collection letters sent at Hess' request by Associated produced no results and Hess' charged off the amount to profit and loss. Thereafter, Hess' turned over the account to General for collection. General accomplished this task by arranging for the plaintiffs to make periodic payments against the balance, and by September, 1974, the Todds had extinguished their debt to Hess'. As late as November, 1975, however, the Todds' credit report showed that, as of the early part of 1973, the plaintiffs owed Hess' $1,200.00. The report contained no mention that the Todds eventually had paid off their debt.

The plaintiffs' primary claim for relief alleges that the misleading, stale, and erroneous credit report distributed to various retailers by Associated rose to the level of negligent noncompliance with the Act, 15 U.S.C. §1681o. As their secondary claim for relief, plaintiffs allege that Associated violated the Act by failing to inform them of their right, under 15 U.S.C. §1681i(d), to request Associated to notify any person who had received a consumer report within the last six months that the consumer report contained inaccurate information.

The purpose of the Fair Credit Reporting Act is

> ...to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to

> the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

15 U.S.C. §1681(b). If plaintiffs are to prevail in this action, they must prove initially that the defendants are consumer reporting agencies as defined in the Act. Porter v. Talbot Perkins Children's Services 355 F.Supp. 174, 176 (S.D.N.Y.1973).

I believe that neither Hess' nor General falls within this definition. As explained by the Court in Porter,

> [e]ssentially, this definition contains four links. (1) The consumer reporting agency must act for monetary fees, dues, or on a cooperative non-profit basis; (2) it must regularly engage in whole or in part in gathering or evaluating information on consumers; (3) the purpose of such activity must be the distribution of information to third parties engaged in commerce; and (4) the agency must use a facility of interstate commerce to prepare or distribute the reports.

355 F.Supp. at 176-7. None of the four

elements of the definition exist in this case. Hess' is a retail department store; General is a collection agency for overdue and delinquent accounts payable. Looking at their activities in the light most favorable to the plaintiffs, Hess' and General disclose either to each other or to Associated only their personal experiences in dealing with the Todds. In Porter, the Court relied upon Federal Trade Commission guidelines which, in interpreting the phrase "consumer credit agencies" stated:

> ...giving out a firm's own ledger experience does not make it a consumer reporting agency or the information a consumer report. In order to be a consumer reporting agency, the firm must engage "in whole or in part" in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. When a firm gives its own credit experience on a consumer to a credit bureau, that information does not constitute a

consumer report.

355 F.Supp. at 177. See 15 U.S.C. §1681a (d) (A). Because neither Hess' nor General can be considered a consumer reporting agency as defined in the Act, I shall grant summary judgment in their favor.

Associated, as compared with the above two defendants, admits that it acts as a credit reporting agency within the meaning of the Act. As such, its statutory obligation is to "...follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. §1681e(b). The Court, however, does not need to reach the issue of reasonableness if it finds initially that the report furnished was accurate. Middlebrooks v. Retail Credit Co. 416 F.Supp. 1013, 1015 (N.D. Ga. 1976). See Roseman v. Retail

Credit Co., Inc. 428 F.Supp. 643 (E.D. Pa. 1977). In Middlebrooks, the credit report revealed that plaintiff had been arrested in connection with a gambling raid. Plaintiff did not question the accuracy of the credit report statement concerning his arrest; instead, plaintiff disputed only the place of arrest and argued that the credit report should have contained some mention that there was no ultimate disposition of the criminal charge against Plaintiff. The Court, following Peller v. Retail Credit Co. Civil No. 17900 (N.D. Ga., filed Dec. 5, 1973), aff'd mem., 505 F.2 733 (5th Cir. 1974), rejected plaintiff's argument and held that, "'...in order to pursue a cause of action predicated upon willful or negligent violation of 15 U.S.C. §168le(b), the report sought to be attacked must be accurate.' (citations omitted)." 416 F.Supp. at 1015.

In the present case, the Todds do not dispute; that their account reached a high balance of $1,200.00 in October, 1972; that Hess' charged the debt to profit and loss; and that Hess' placed the account for collection with General. These facts are unquestionably accurate and are extremely important to merchants and retailers in deciding whether or not to extend credit to persons such as the plaintiff. Because the report is not inaccurate, I must conclude, in accordance with Middlebrooks, that the Todds can not sustain their cause of action.

Plaintiffs also complain that Associated violated the act by disclosing stale and obsolete information. The plaintiffs' position is unfounded, however, because the Act proscribes the disclosure of information such as that involved here only where the information antedates the

report by more than seven years. 15 U.S.C. §1681c(a) (4). The facts of the case establish that fewer than four years had elapsed from the time that the Todds' account reached the $1,200.00 balance to the time that plaintiffs filed their complaint. Therefore, I find that Associated did not report obsolete information in violation of the Act.

Upon the finding that Associated reported accurate information, the Todds' secondary claim for relief under 15 U.S.C. §1681i (d) must also fall. That section requires the consumer reporting agency to disclose to the consumer his right to request the consumer reporting agency to notify certain designated persons of the deletion from the report of information found to be inaccurate. Once again, I must state that the Todds' consumer

report contained no inaccurate information. Therefore, no deletions were necessary and no deletions were made. Moreover, the Act imposes no affirmative duty on the consumer reporting agency to inform the consumer of such procedure. Middlebrooks, at 1018; Roseman, at 646. For the above reasons, I conclude that the Todds have failed to prove that Associated violated the Act.

Accordingly, I shall grant each defendant's Motion for summary judgment and I shall deny the plaintiffs' motion for partial summary judgment.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

NO. 78-430

EDGAR TODD, JR., et al.,
Petitioners,
v.
ASSOCIATED CREDIT BUREAU SERVICES, INC., et al.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT ASSOCIATED CREDIT BUREAU SERVICES, INC. IN OPPOSITION

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INDEX

TABLE OF CITATIONS

STATUTES INVOLVED

Fair Credit Reporting Act, §607(b), 15 U.S.C. §1681e(b):

> Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of information concerning the individual about whom the report relates.

Fair Credit Reporting Act, §611, 15 U.S.C. §1681i:

> (a) If the completeness or accuracy of any item of information contained in his file is disputed by a consumer, and such dispute is directly conveyed to the consumer reporting agency by the consumer, the consumer reporting agency shall within a reasonable period of time reinvestigate and record the current status of that information unless it has reasonable grounds to believe that the dispute by the consumer is frivolous or irrelevant.
>
> If after such reinvestigation such information is found to be inaccurate or can no longer be verified, the consumer reporting agency shall promptly delete such information....
>
> (b) If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute. The consumer reporting agency may limit such statements to not more than one hundred words if it provides the consumer with assistance in writing a clear summary of the dispute.

(c) Whenever a statement of a dispute is filed, unless there is reasonable grounds to believe that it is frivolous or irrelevant, the consumer reporting agency shall, in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof.

(d) Following any deletion of information which is found to be inaccurate or whose accuracy can no longer be verified or any notation as to disputed information, the consumer reporting agency shall, at the request of the consumer, furnish notification that the item has been deleted or the statement, codification or summary pursuant to subsection (b) or (c) of this section, to any persons specifically designated by the consumer who has within two years prior thereto received a consumer report for employment purposes, or within six months prior thereto received a consumer report for any other purpose, which contained the deleted or disputed information. The consumer reporting agency shall clearly and conspicuously disclose to the consumer his rights to make such a request. Such disclosure shall be made at or prior to the time the information is deleted or the consumer's statement regarding the disputed information is received.[1]

1. Respondent respectfully notes that the excerpt from §611(a) of the Act as set forth in the Petition for Certiorari is incorrect in that the word "correct" was inadvertently substituted for the word "current."

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether a consumer reporting agency reports "accurate" information under the Fair Credit Reporting Act when it correctly reports the status of an account as of a stated date in the past, but neither gives nor purports to give the current status of the account.

2. Whether Congress intended to create civil liability for "incompleteness" or lack of currency in cases such as this, thereby requiring Credit Bureaus to update information constantly.

3. Whether Respondent Associated Credit Bureau Services, Inc. had any obligation of disclosure under §611 of the Fair Credit Reporting Act which it failed to fulfill.

COUNTERSTATEMENT OF THE CASE

The depositions and pleadings in this case establish the following facts not fairly in dispute: Associated Credit Bureau Services, Inc. ("Credit Bureau") is a "consumer reporting agency" and issued "consumer reports" regarding Plaintiff Edgar Todd, Jr. to Kern's Furniture Store on November 14, 1975; to Merchant's National Bank on October 20, 1975; and to Sears Roebuck & Co. on December 17, 1974. Along with other information, each of these reports related that as of March, 1973, Plaintiff Edgar Todd, Jr. owed Hess's the sum of $1227; that as of that date the entire

balance was past due, and had been charged by Hess's, Inc. to profit and loss as a bad debt, and/or that the account had been placed for collection. All of this was true. (N.T. Edgar Todd 18-19; N.T. Rohrbach 18-19 and Exhibit 1, p. 4; and N.T. Alice Todd 93-95).

The Petitioners rest their entire case on the undisputed fact that in September, 1974, the account at Hess's was paid in full, and that this fact--not reported to Credit Bureau and not known by Credit Bureau--was not contained in the consumer reports listed above. Upon later ascertaining that the account had subsequently been paid, Credit Bureau added that fact to the information in its files.

REASONS WHY THE WRIT SHOULD BE DENIED

Credit Bureau admits being a consumer reporting agency which issues consumer reports. Accordingly, the first portion of Petitioner's Brief is inapplicable and will not be discussed. The Petition also contains oblique references to Petitioner's Motion for Partial Summary Judgment, which the trial court denied. Of course, the refusal to grant summary judgment is an interlocutory order which is not appealable under the relevant jurisdictional statutes. 28 U.S.C. §§1291, 1292.

I. The Consumer Reports Issued by Credit Bureau were "Accurate" within the Meaning of the Fair Credit Reporting Act.

The second issue framed by Petitioners is whether liability arises from a report of "stale and misleading information." In part of the argument on that issue, Petitioners also suggest that the information reported was "inaccurate." It is important to note at the outset that the obligations imposed by the Act on consumer reporting agencies are not couched in those terms. Petitioners rely primarily on Section 607(b), 15 U.S.C. §1681e(b).[2] That provision sets forth the Act's requirements regarding accuracy of consumer reports:

> "Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of information concerning the individual about whom the report relates." §607(b), 15 U.S.C. §1681e(b).

Thus, strict accuracy is not a requirement of the Act; instead, agencies need only adopt "reasonable procedures" directed to that goal.

Petitioners, however, demonstrably failed to meet even the threshold question of

2. Two other sections are advanced as supporting liability. The first, §601(n), 28 U.S.C. §1681(b), is a statement of Congressional purpose, and imposes no independent requirements. The second, §611(d), 15 U.S.C. §1681(d), is discussed infra, at 17.

inaccuracy. Courts which have construed this section have consistently held that where the information contained in a consumer report is accurate, the issue of reasonableness of procedures need not be reached. Middlebrooks v. Retail Credit Company, 416 F. Supp. 1013 (N.D. Ga. 1976); Austin v. Bankamerica Service Corporation, 419 F. Supp. 730 (N.D. Ga. 1974); Peller v. Retail Credit Company, 359 F. Supp. 1235 (N.D. Ga. 1973), aff'd mem. 505 F.2d 733 (5th Cir. 1974); Roseman v. Retail Credit Co. Inc., 428 F. Supp. 643 (E.D. Pa. 1977). Plaintiff's unsupported implication that a conflict exists among the Circuits on this point is not correct.[3] This holding represents the unanimous view of those courts which have considered this issue.

The information provided in the reports issued by Credit Bureau in this case was not "inaccurate" in any normal sense of the word. Credit Bureau simply informed its clients that as of a certain date, Mr. Todd had defaulted on one of his credit arrangements, and that as of that date, his creditor had written off the obligation as a bad debt or placed the account for collection.

3. In fact, the Plaintiff cites only one Circuit Court decision with any discussion whatsoever. Millstone v. O'Hanlon Reports, Inc., 528 F.2d 829 (8th Cir. 1976), involved information which was clearly inaccurate.

The fact that Mr. Todd later paid the account does not render untrue the fact that he had previously defaulted, and that historical fact was and is relevant credit information. The District Court and the Court of Appeals, recognizing this reality, found the report to be accurate. This made summary judgment appropriate without reaching the issue as to the reasonableness of Credit Bureau's procedures.

In their brief before the Court of Appeals, Petitioners for the first time attempted to find record support for the argument that the credit report did not simply speak as of a date in the past. Yet nothing in the record supports this notion that Credit Bureau purported to deliver a current financial statement of the Todds. In the Petition before this Court, Petitioners state that "according to Randall Skeath, Credit Manager of Kern's Furniture, [Credit Bureau's report] meant that the bill remained unpaid on November 14, 1975 even though the reality was that the bill was paid in full September of 1974." It is not surprising that Petitioners do not refer to any portion of the record to support this statement, because it is incorrect. Mr. Skeath's testimony was clearly to the contrary -- he testified that the report spoke as of a time in the past. (N.T. Skeath, p. 145). The report was silent regarding the current status of that account, and Skeath understood it to be so. That

Kern's gave credit to the Todds when it received assurance that the balance had been paid is not to the contrary. The report of non-payment as of the earlier date did not negate payment as of the time of the transaction and Skeath simply required assurance that the old debt was now paid.

Ronald Smith, Credit Bureau's manager, also gave unequivocal testimony as to what Credit Bureau's reports stated. He explained clearly that the report merely recorded a fact in existence on a date in the past. (N.T. Smith, 32-3). In short, Credit Bureau's recorded information spoke only as of March of 1973. Petitioners concede that the reported facts were true as of that date. Accordingly, the District Court and the Court of Appeals correctly found that the information reported by Credit Bureau was accurate.

The Petition for Certiorari also contains a bald reference to "the reality of actual trade practice, and the meaning of the words as used in the trade." Again, there is absolutely nothing in the record to be considered on a Motion for Summary Judgment which supports this flat statement. A mere self-serving contention in a petition for certiorari regarding "trade practice" is insufficient to overcome the District Court's finding based on Skeath's testimony and uncontroverted evidence of what the Credit Bureau's data bank contained.

The Middlebrooks case, supra, involved a credit report containing information that the plaintiff had been arrested in connection with a gambling raid. The plaintiff did not contest the accuracy of the fact of arrest; he "only dispute[d] the place of arrest and argue[d] that some mention should have been given that there was no ultimate disposition of the criminal charge against Mr. Middlebrooks." 416 F. Supp., at 1015. The Court rejected the plaintiffs' attack under §607(b).

> "[T]his Court need not reach the issue of 'reasonableness' if it finds initially that the report furnished was inaccurate.
> ...
> Since the plaintiffs do not dispute the accuracy vel non of the statement that Mr. Middlebrooks was arrested, we, therefore, conclude that plaintiffs are not entitled to recover for willful or negligent violation of 15 U.S.C. §1681e(b)." 416 F. Supp., at 1015-1016.

The same result should be reached here, where it is beyond dispute that in fact Petitioners defaulted on the Hess's account, and that Hess's had charged the debt to profit and loss and placed it for collection. This information was valid and relevant data regarding Mr. Todd's creditworthiness, regardless of whether or not he ultimately paid the debt one and one-half years later.

The plaintiffs also characterize these reports as "stale," implying that the information

was too old to report. As the record shows, the report on Mr. Todd's default as of March, 1973 was given in December of 1974 and in October and November of 1975. Plaintiff's argument is unavailing, since the statute includes an explicit legislative judgment as to when adverse information of this type would be too old to report. Section 605 of the Act, entitled "Reporting of obsolete information prohibited," provides:

> Except as authorized under subsection (b) of this section [involving, inter alia, credit transactions of $50,000 or more], no consumer reporting agency may make any consumer report containing any of the following items of information:
> ...
> (4) Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years. 15 U.S.C. §1681c(a)(4).

The prohibition of use after seven years implies a permissible use for seven years.[5]

The legislative history makes this intention clear; the section reflects a balancing

5. The petition cites a portion of the FTC's Compliance Pamphlet discussing "periodic re-evaluation" of data. (p. 48). Apart from the fact that this is not inconsistent with Credit Bureau's practice, it is necessary only to refer to an earlier footnote in the Petition regarding the same document: "It is respectfully pointed out that the FTC does not have rule making power under the F.C.R.A. and that its opinions are not binding on the Court." Much less could the FTC's pamphlet author vary the plain language of the statute quoted above.

of the need of creditors to know about such matters and the need of consumers not to be unduly stigmatized. As Senator Proxmire, the author and floor manager of the bill, reported to the Senate:

> Creditors obviously have a right to know if a person has had trouble in paying his bills. At the same time it is unfair to burden a consumer for life with a bad credit record if he has improved his performance. The Associated Credit Bureaus has recognized this problem and has proposed voluntary guidelines to its members to the effect that adverse information not be reported if it is older than 7 years or 14 years in the case of bankruptcies.
> ...
> The bill would handle this problem by prohibiting the reporting of adverse information older than 7 years or 14 years in the case of bankruptcies, thus extending the ACB voluntary guidelines to other segments of the industry."
> 15 Cong. Rec. 33410 (1969). See also S. Rep. No. 91-517, 91st Cong., 1st. Sess., 4 (1969).

The legislation was intended to approve and mandate the prior industry practice of purging this class of information only after seven years. Thus plaintiffs' contention that the report could somehow give rise to liability because the information was "stale" is wholly devoid of merit.

Finally, the plaintiffs have characterized the reports involved here as "incomplete." Apparently, plaintiffs intend to

include "completeness" within the meaning of the word "accuracy" in 607(b). But the Credit Bureau has no obligation under the Act or any other law to "update" the information in its files every three months or 13 months or 14 months, as the plaintiffs apparently contend.

Again, basic statutory construction makes it clear that such an onerous requirement was not the intention of Congress. It is important to note the language of another section of the same statute, providing procedures for resolving consumer objections to information in credit files. Section 611 of the Act provides that "If the completeness or accuracy of any item of information contained in his file is disputed by the consumer, [certain procedures shall be followed.]" 15 U.S.C. §1681i. (emphasis supplied). These two sections are, of course, in pari materia; and since Congress is presumed to have used no superfluous words, Born v. Allen, 291 F.2d 345 (D.C. Cir. 1960), the statutory word "accuracy" in §607 cannot mean "completeness and accuracy" as used in §611. Accordingly, plaintiffs can have no cause of action under §607 based on "incompleteness."

Another section of the Act reinforces this conclusion. Section 613, entitled "Public record information for employment purposes," provides:

> "A consumer reporting agency which furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment shall--
> ...
> (2) maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date." 15 U.S.C. §1681k (emphasis added).

That Congress expressly specified this one instance requiring strict procedures to ensure updating of consumer report data rebuts plaintiffs' broader contention that updating is required in all cases. Expressio unius est exclusio alterius is a well-settled principle of statutory construction. National Railroad Passenger Corporation v. National Association of Railroad Passengers, 414 U.S. 453, 458 (1974). "When the legislature has carefully employed a term in one section and has excluded it in another, it should not be implied where excluded." Bott v. American Hydrocarbon Corporation, 458 F.2d 229, 233, (5th Cir. 1972).

II. Congress did not Intend to Create Civil Liability for "Incompleteness" - or Lack of Current Information - in Cases Such as This.

In enacting the Fair Credit Reporting Act, Congress produced a comprehensive, unified scheme for regulating the flow of consumer credit information. It recognized that inaccurate or incomplete information would find its way into credit files. Balancing both the magnitude of the task of maintaining such files and the importance to the consumer of credit reports, Congress chose specific and exclusive methods for approaching the goals of accuracy and completeness.

Beyond the specific obligations imposed on agencies by the Act,[6] Congress provided (in Sections 609 through 612 of the Act) for a consumer-initiated procedure to correct inaccuracies and make credit files complete. Section 611 requires that "If the completeness or accuracy of an item of information contained in his file is disputed by a consumer, ... the consumer reporting agency shall... record the current status of that information...." 15 U.S.C. §1681i (emphasis supplied). Further subsections deal with resolving

6. Except for public record employment information, these are that agencies maintain the "reasonable procedures" discussed below, that they not report obsolete information as defined in the Act, and that they report only to the proper people.

such disputes and notifying former users of any inaccurate information when the consumer so requests. This is the procedure Congress chose for resolving problems such as the Todds', and this procedure was followed in their case. (N.T. Edgar Todd 33-40; N.T. Alice Todd 91-100.)

Plaintiffs apparently would construe the statutory scheme to require a credit agency to update constantly every bit of information in its files. But this and other methods were considered and rejected by Congress in favor of the method described above. As shown in the way it treated adverse public record information used for employment purposes, Congress weighed two approaches to ensure updating when required by public policy: (1) to require the agency to give notice of the adverse information to the subject thereof, or (2) to require the agency to make an investigation on the current status of the information, that is, to update. Updating would obviously cost more than notifying, and would be quite expensive[7]--and Congress decided, after

7. Credit Bureau submitted an affidavit with its motion showing that to update all its information annually would require a 624% increase in work-force involved. To update all adverse trade experience data in all files would require 208% increase in that work-force and related expenses.

thinking about it, that even requiring notification in every case was too onerous a burden to place on the consumer reporting agency:[8]

> "Mr. PROXMIRE. As I drafted this bill originally, I provided that whenever adverse information is included in any file, the consumer would have to be notified, and I was strongly for that. This was discussed by the committee. It was discussed in the hearings at some length. We were finally convinced that this would involve so much expense and so much difficulty for the credit agencies that they had a legitimate complaint about it. Therefore, we took something which would be less satisfactory to the consumer--I would agree--but which would work in most cases; that is, whenever, a consumer is turned down, he then could have the right to find out what is in his credit file and to have it corrected.
>
> The Senator from New York is absolutely correct in his implications about inaccurate, untrue, or slanderous information in a file which many people might not know exists. But the theory is that until they are damaged in some way by an adverse reaction on employment, insurance, or credit, they do not have as much basis for correcting it.
> ...

8. As the cost of credit is passed along to the consumers who use it, imposing such a burden on all credit bureaus would ultimately inure to the detriment of consumers, and would be inconsistent with the Congressional findings and statement of purpose in enacting the statute. See §602(a)(1) - (3), 15 U.S.C. §1681.

> Mr. JAVITS. [The right of a consumer to bring suit for false information furnished with malice] is very important because I realize the reporting agencies get something out of this. They get a limitation of liability; the right to publish certain information, as in periodicals, not notifying the consumer until he is hurt.
>
> Mr. PROXMIRE. That is the quid quo pro [sic] for full disclosure."
> 115 Cong. Rec. 33411 (1969).

Thus for the normal credit report--like the one in this case--updating is not required until the consumer initiates the review procedure established by Sections 609 through 612 of the Act, 15 U.S.C. §§1681g-1681j.

III. Credit Bureau Had No Obligation Under Section 611 of the Act that it Failed to Fulfill.

In their final argument, Petitioners contend that the Fair Credit Reporting Act imposes on consumer reporting agencies the obligation to inform consumers of their right to request notification of all businesses who received disputed information, where that information is incomplete and inaccurate. Even if this stated the law correctly, it would assume that the information concerned in this case was inaccurate. As found by the Courts below, the information was not inaccurate.

The Petition contains the assertion that "the Court found that Associated failed to advise the plaintiffs of their right to have all businessmen who received the disputed information of an update of their file [sic]." This is also incorrect. In fact, Credit Bureau contested the contention that its interviewer had not notified the Todds of all their statutory rights. But while this is a "genuine issue of fact" between the parties, it is not "material" within the meaning of Rule 56, and both lower courts correctly decided that summary judgment was proper.

The dispute is of law, not fact. Plaintiffs contend that under Section 611, Credit Bureau is obliged not only to add further subsequently arising information to the truth reported as of an earlier date, but also to inform the consumer that the Credit Bureau will report to previous users about the new information. However, the Act does not so obligate Credit Bureau. Again, the fundamental issue which plaintiffs ignore is the statutory distinction between "accuracy" and "completeness." Section 611 establishes the procedure to be followed by a consumer contesting the accuracy or completeness of information in his file. Information that is inaccurate or can no longer be verified must be deleted:

> (a) If the completeness or accuracy of any item of information contained in his file is disputed by a consumer, and such dispute is directly conveyed to the consumer reporting agency by the consumer, the consumer reporting agency shall within a reasonable period of time reinvestigate and record the current status of that information unless it has reasonable grounds to believe that the dispute by the consumer is frivolous or irrelevant. If after such reinvestigation such information is found to be inaccurate or can no longer be verified, the consumer reporting agency shall promptly delete such information....
> 15 U.S.C. §1681i(a).

Section 611(b) provides the course to be followed when a dispute is not resolved, and subsection (c) requires that a statement of dispute filed pursuant to subsection (b) must be included in any subsequent consumer report. 15 U.S.C. §1681i(b) and (c).

It is only subsection (d) that requires the agency, upon the consumer's request, to notify those who prior thereto received reports - and that requirement becomes applicable only where a deletion of inaccurate information is required or made, or where the accuracy of information is disputed and a statement regarding the dispute placed on file. Middlebrooks, supra, 416 F. Supp. at 1014; Roseman, supra, 428 F. Supp. at 646. The subsection provides:

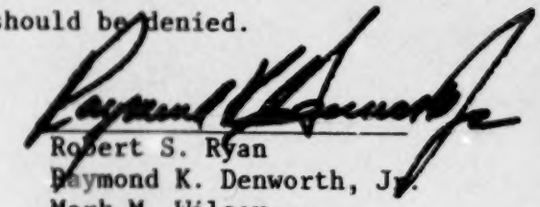
> (d) Following any deletion of information which is found to be inaccurate or whose

> accuracy can no longer be verified or any notation as to disputed information, the consumer reporting agency shall, at the request of the consumer, furnish notification that the item has been deleted or the statement, codification or summary pursuant to subsection (b) or (c) of this section to any person specifically designated by the consumer who has within two years prior thereto received a consumer report for employment purposes, or within six months prior thereto received a consumer report for any other purpose, which contained the deleted or disputed information. The consumer reporting agency shall clearly and conspicuously disclose to the consumer his rights to make such a request. Such disclosure shall be made at or prior to the time the information is deleted or the consumer's statement regarding the disputed information is received. 15 U.S.C. §1681i(d)

In our case, no deletion or notation was made or required, because the information complained of was not inaccurate within the meaning of the statute. The Courts below were correct, therefore, in concluding that Credit Bureau was under no obligation to notify the plaintiffs of any right on their part to request notification; they possessed no such right under §611(d).

CONCLUSION

For all of these reasons, the Petition for a Writ of Certiorari should be denied.



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December 8, 1978

In the Supreme Court of the United States

No. 78-430

EDGAR TODD, JR., AND ALICE TODD,
Petitioners

v.

ASSOCIATED CREDIT BUREAU SERVICES, INC., GENERAL CREDIT CONTROL, INC., AND HESS'S, INC.,
Respondents

RESPONSE OF GENERAL CREDIT CONTROL, INC., OPPOSING PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

From time to time reference will be made in the text of this brief to the action and inaction of the various other parties to this litigation. Such reference will be made exclusively for the purpose of clarifying and amplifying the limited role of the Respondent, General Credit Control, Inc., regarding the accumulation, assimilation, and/or dissemination of information regarding Edgar Todd, Jr. and Alice Todd. Such references are not intended to infer any wrongdoing on the part of any of the other Respondents in this action nor do they necessarily reflect the beliefs of the Respondent, General Credit Control, Inc., but rather the sworn testimony of the various parties as recorded at the depositions of said parties.

QUESTIONS PRESENTED

The questions raised by Petitioners with respect to Respondent, General Credit Control, Inc., are twofold:

A. Is General Credit Control, Inc., a "Credit Reporting Agency" as defined by the Fair Credit Reporting Act, 15 U.S.C. §1681 a (f)?

B. If General Credit Control, Inc., is a "Credit Reporting Agency" did it issue a "Consumer Report" with stale or misleading information re Petitioners or otherwise violate the Fair Credit Reporting Act, 15 U.S.C. §1680, et seq.?

STATEMENT OF CASE

Respondent, General Credit Control, Inc. (hereinafter referred to as "General"), is currently and was at all times relevant to this litigation a collection agency, solely and exclusively engaged in the business of collecting overdue and delinquent accounts payable belonging to local merchants, said merchants having been unsuccessful in their attempts to obtain payment on said accounts from the respective customers (Affidavit of Michael Shatsky (hereinafter "Shatsky"), p. 2). The business of General was to receive overdue and delinquent accounts payable from local merchants and thereafter attempt to effect collection of same on behalf of said merchants (Shatsky, p. 2). While the particular method utilized in this operation is set forth at length in the affidavit of Michael Shatsky, it can be stated, generally, that General would be advised by a local merchant of the identity, address, employer, amount owed to said merchant and date of last payment on said account in referring an account to General for collection (Shatsky, pp. 2-4); Deposition of Mrs. Ruth Rohrbach (hereinafter "Rohrbach", p. 60). Thereafter General would effect collection of said account, to the extent possible, and remit to the respective merchant a report of such collection along with the amount received, less the fee of General for collecting said monies (Shatsky, pp. 2-3; Rohrbach, p. 59). Upon receipt of the full amount owed on any given account, General would, in transmitting the final payment to the merchant in question, note that the account was now paid in full

and General would thereafter close their file on said account (Shatsky, pp. 2-3; Rohrbach, p. 59).

One of the numerous clients serviced by General is Hess's, Inc. (hereinafter referred to as "Hess's"), and on June 17, 1973, General received for collection from Hess's the overdue and delinquent account of Edgar C. Todd, Jr., and Alice Todd (Shatsky, p. 3). The totality of information received by General from Hess's was contained on a 3 x 5 file card and consisted of the following:

> "Mr. & Mrs. Edgar C. Todd, R. D. No. 1, Box 329-B, Slatington, Pennsylvania 18080
>
> Alice 262-9540
>
> Amount—$1,227.20
> Last Paid—3/72
> Last Purchase—6/72
> Employment—Richard Flores Catasauqua Truck Driver
> Nearest Relative—Edgar Todd Rl Allentown, PA"
> (Shatsky, pp. 3-4)

After receipt of the above information, General attempted to contact the Todds on several occasions and finally succeeded in contacting them and setting up a payment plan for the liquidation of the current balance of One Thousand Two Hundred Twenty-Seven Dollars and Twenty Cents ($1,227.20) owed to Hess's (Shatsky, p. 4).

Beginning on September 7, 1973, the Todds initiated payment of the above-noted amount with a remittance of Fifty Dollars ($50.00) and thereafter continued to make payment to reduce the balance owed on the Hess's account

until August 5, 1974, when they remitted One Hundred Dollars ($100.00) to General. In early September of 1974, the Todds paid the remaining balance on their account with Hess's directly to Hess's (Deposition of Mrs. Todd (hereinafter "Mrs. Todd"), pp. 114-116; Rohrbach, p. 20 & Exhibit "1" thereof, pp. 5-6, p. 25). On September 10, 1974, General contacted Mrs. Todd and was informed by her that the remaining balance had been paid in full to Hess's (Shatsky, p. 5). This fact is contested by Mrs. Todd who contends she never contacted or was contacted by General after making the final payment to Hess's (Mrs. Todd, pp. 115-116). General contacted Hess's to confirm the representation of Mrs. Todd that the account was paid in full and learned from Hess's that full payment had been received of the remaining balance on said account (Shatsky, p. 5). The Hess's account of Edgar Todd, Jr. and Alice Todd having been paid in full, General's file on the Todds was closed and there was no further activity with regard to said file with two exceptions set forth in the next paragraph (Shatsky, p. 5).

Some months after General had closed their file on the Hess's account of Edgar Todd, Jr. and Alice Todd, a call was received from Mrs. Todd complaining to General that the Associated Credit Bureau Services, Inc. (hereinafter referred to as "Credit Bureau") file on Edgar Todd, Jr. and Alice Todd indicated an outstanding balance on the Hess's account (Shatsky, p. 5), Mr. Shatsky informed Mrs. Todd that he was not a member of nor responsible for the Credit Bureau and only reported to Hess's. Mr. Shatsky volunteered to, and thereafter did, however, contact Hess's and advise them of the problem at the Credit Bureau and that the Todd account was paid

in full (Shatsky, p. 5). With the telephone call to Hess's no further action involving the Todd file re Hess's occurred until General was contacted by the attorney for the Plaintiffs and advised of the initiation of this lawsuit by the Petitioners against the Respondent, General (Shatsky, pp. 5-6).

Mrs. Todd's version of the above incident somewhat differs from Mr. Shatsky's. Upon being denied credit at Kern's Furniture, Mrs. Todd testified that she called the Respondent, Credit Bureau, and informed them that the Hess's bill had been paid in full (Mrs. Todd, p. 88). Thereafter Mrs. Todd testified she received a return call from the Credit Bureau indicating that they contacted Hess's and were unable to verify that her account had been paid (Mrs. Todd, p. 88). Mrs. Todd then testified that she advised the Credit Bureau to contact General and that the lady from the Credit Bureau thereafter contacted General (Mrs. Todd, p. 88). Mrs. Todd thereafter testified, "I guess that's how she finally got it straightened out then that it was paid," referring to the Credit Bureau's calling General (Mrs. Todd, p. 88). Thereafter, under cross-examination by counsel for General, Mrs. Todd admitted that she was not present when any call was made by the Credit Bureau to Respondent, General, that the lady at the Credit Bureau never stated she called General, and that Mrs. Todd did not recall whether or not she, herself, contacted General at about this time regarding the problem of the Hess's bill being carried as unpaid by the Credit Bureau (Mrs. Todd, pp. 114-116).

Prior to the initiation of this lawsuit, General made no disclosures of information regarding the Hess's account

of Edgar Todd, Jr. and Alice Todd to anyone other than Hess's (Shatsky, pp. 5-6). Specifically with reference to the Credit Bureau, the deposition of Mr. Ronald C. Smith (hereinafter "Smith") sets forth that there is nothing in the records of the Credit Bureau to indicate that information was either solicited from or received from General (Smith, pp. 37, 48-50, 55-56, 67 & 69). The aforesaid references to the deposition of Mr. Ronald C. Smith clearly indicate that any solicitation or consideration of information by the Credit Bureau from General would be in violation of their operation procedures. Further, the deposition of Mr. Randall Skeath indicates that his employer, Kern's Furniture Store, never received any consumer credit reports on the Todds from General.

On cross-examination during her deposition Mrs. Alice Todd was unable to set forth one particular instance in which a consumer credit report was issued by General to any third party (Mrs. Todd, pp. 118-122). The very most she was able to testify to in this respect was that Michael Shatsky of General stated that if she encountered any difficulty in attempting to buy a television he would be glad to indicate that she had been making orderly payments on her Hess's account which had been placed with him for collection. There was no evidence that the television store, Kleckner's, ever requested or received any information from General (Mrs. Todd, p. 120).

Petitioners' statement of facts is incorrect and materially misrepresents the facts of this case insofar as Petitioners' Brief states on pages 10-11:

> "In August of 1973, the Plaintiffs' account was turned over to Defendant, General Credit Control,

Inc. (hereinafter "General") for collection with the Defendant, General, being aware that the Defendant, Associated, was advised that the account was delinquent."

Respondent, General Credit Control, Inc., notes that no citation to the record is provided in support of the allegation that General Credit Control, Inc., was "aware that Defendant, Associated, was advised that the [Todd] account was delinquent." The record is barren of any inference of such a fact, let alone a statement to that effect, and the affidavit of Michael Shatsky (Shatsky, p. 4), sets forth the sum total information transmitted by Hess's to General Credit Control, Inc.; and, as a review of that affidavit will indicate, there is no reference therein to the Credit Bureau or the placing of any report to any third person by Hess's with respect to the Todds.

ARGUMENT

A. General Credit Control, Inc., given the definition of a "Consumer Reporting Agency" under the Fair Credit Reporting Act, 15 U.S.C. §1801 a (f), and the facts of this case as fully set forth in the record, is not subject to the Fair Credit Reporting Act.

B. General Credit Control, Inc., given the definition of a "Consumer Report" under the Fair Credit Reporting Act, 15 U.S.C. §1801 a (d), and the facts of this case, as fully set forth in the record, did not issue a "Consumer Report" on Petitioners or otherwise violate the Fair Credit Reporting Act.

C. The Arguments advanced by Petitioners' Brief, as to Respondent General Credit Control, Inc., are predicated or misstated or nonexistent facts, and assert liability based upon theories for which neither case precedent nor statutory law are cited for authority.

A. General Credit Control, Inc., Given the Definition of a "Consumer Reporting Agency" Under the Fair Credit Reporting Act, 15 U.S.C. §1801 a (f), and the Facts of This Case as Fully Set Forth in the Record, Is Not Subject to the Fair Credit Reporting Act

It is the contention of the Respondent, General, that the resolution of this issue is dispositive of General's mo-

tion to dismiss or, in the alternative, for summary judgment. If it be determined that the facts, even when considered in the light most favorable to the Petitioners, fail to set forth any basis for a finding that General is a "consumer reporting agency" as defined in the Fair Credit Reporting Act, then General's motion to dismiss or, in the alternative, for summary judgment was properly granted. Judicial support of such an interpretation is found in the case of *Porter v. Talbot Perkins Children's Services, et al.*, 355 F.Supp. 174 (S.D. N.Y. 1973).

In *Porter v. Talbot Perkins Children's Services, et al.*, supra, the Federal District Court for the Southern District of New York was called upon to rule on the defendant's motion to dismiss or, in the alternative, for summary judgment. In that case the plaintiff had alleged a violation of the Fair Credit Reporting Act predicated on the release of information obtained from and through the plaintiff to third parties through whom the plaintiffs were attempting to adopt children.

After a preliminary review of the purpose of the Fair Credit Reporting Act, the Court turned its attention to the definition of "consumer reporting agency" as set forth in the Act.

> "The consumer reporting agency, to which the Act is directed is defined as follows:
>
> The term 'consumer reporting agency' means any person which, for monetary fees, dues, on a cooperative non-profit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports. Section 1681 (a) (f)." 355 F.Supp. at 176.

Having thus set forth the statutory definition of a "consumer reporting agency" the Court then turned its attention to the significance of that definition in terms of the case before it.

> "A finding that a perspective defendant fits within the definitional boundaries is a requisite to the imposition of procedural requirements and possible liabilities contained in the Act." 355 F.Supp. at 176.

With the above statement the Court in a clear and unequivocal fashion set forth as a prerequisite to any consideration of liability under the Act a finding that the defendant in question is, in fact, under the definition of the Act, a "consumer reporting agency." Absent such a preliminary threshold determination no cause of action can be made out under the Fair Credit Reporting Act, 15 U.S.C.A. Section 1680 et seq. (1974).

In attempting to arrive at a determination as to precisely who falls within the category of "consumer reporting agencies" the Court looked to the Federal Trade Commission's preliminary interpretations of the Act for guidance. One particular portion of the FTC's comments considered by the Court appeared particularly relevant to this case.

> "However, there are many others who may from time to time function as consumer reporting agencies and, to the extent they issue consumer reports, they

will be covered by the Act. For example, some banks and finance companies have engaged in the practice of giving out credit information other than that which they have developed from their own ledgers. To the extent they give out information and experience gained from other creditors, such banks and finance companies would be functioning as consumer reporting agencies and would be required to comply with the terms of the Act. As indicated earlier, giving out a firm's own ledger experience does not make it a consumer reporting agency or the information a consumer report. In order to be a consumer reporting agency, the firm must engage 'in whole or in part' in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. When a firm gives its own credit experience on a consumer to a credit bureau, that information does not constitute a consumer report." 355 F.Supp. at 177.

The above language appears particularly appropriate in this particular case because there is no question but that a collection agency in some instances may be a "consumer reporting agency" and subject to the provisions of the Act. In this particular case, however, as a review of the facts will confirm, General in no way functioned as a "consumer reporting agency" and never furnished a "consumer report" on Edgar Todd, Jr. and Alice Todd.

Two other cases in which Federal District Courts have been moved to dismiss or grant summary judgment in actions brought under the Fair Credit Reporting Act are *Peller v. Retail Credit Co., et al.,* 359 F.Supp. 1235

(N.D. Ga. 1973), and *Bellshaw v. Credit Bureau of Prescott, et al.,* 392 F.Supp. 356 (Ariz. 1975). In both of these actions one or more of the defendants moved for dismissal of the action against them or in lieu thereof summary judgment on their behalf. In both actions the Court reviewed the definition of a "consumer reporting agency" as set forth in the Fair Credit Reporting Act, 15 U.S.C.A. Section 1681(a) (f) (1974). In both of these cases the Court looked specifically to the business activity of the respective defendants and considered whether or not those activities brought them within the realm of a "consumer reporting agency" as defined in the Act. In both cases the Court took a very strict view of the definition of a "consumer reporting agency" and was unwilling to expand by inference the otherwise clearly set forth parameters of that definition. In both *Bellshaw* and *Peller* the Courts found that the moving defendants were not "consumer reporting agencies" and granted their motions for dismissal or summary judgment.

A review of the conduct of General as set forth in the testimony taken to this point in this matter clearly indicates that General, while being a collection agency, nonetheless engages in no course of conduct which would bring it within the parameters of the definition of a consumer reporting agency under the Act. Clearly, General does not "regularly engage in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers *for the purpose of furnishing consumer reports to third parties*" (emphasis added). As the depositions and affidavit presented in conjunction with the motion clearly indicate, General does not become involved or interested in any particular debtor

until such time as one of its clients refers an overdue and unpaid account to it for collection. At that time General has one interest, and one interest only, and that is the collection of that amount from that debtor. The only information accumulated by General regarding any particular debtor is the amount he is or has paid on said account and that information is transmitted to no one other than the creditor who referred the account to General for collection. Upon receipt of full payment on any given debtor's account said record in the possession of General is closed and no further reference is made to same nor is any information from same provided to any individual save the client who referred the account for collection.

In that all of the information available through testimony and affidavit at this time, even when considered in the light most favorable to the Petitioner, failed to set forth facts upon which a finding could be made that General is a "consumer reporting agency", the Respondent General's, motion to dismiss or, in the alternative, for summary judgment was properly granted.

B. General Credit Control, Inc., Given the Definition of a "Consumer Report" Under the Fair Credit Reporting Act, 15 U.S.C. §1801 a (d), and the Facts of This Case, as Fully Set Forth in the Record, Did Not Issue a "Consumer Report" on Petitioners or Otherwise Violate the Fair Credit Reporting Act

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The gravamen of the Petiioners' complaint against the Respondent, General, as set forth in Count II of the

complaint in this matter alleges that the Respondent, General, on one or more occasions after September 1, 1974, issued consumer reports concerning the Petitioners to third parties containing credit information of disputed accuracy and that the Respondent, General, was either negligent in failing to follow or willfully failed to follow reasonable procedures to assure the maximum possible accuracy of information concerning the Petitioners in its files. The remaining allegations of Petitioners' complaint regarding Respondent, General, are mooted if it is determined that General never issued any consumer reports on or after September 1, 1974, regarding the Todds and was neither negligent nor willful in failing to follow reasonable procedures to assure the maximum possible accuracy of its files regarding the Petitioners.

The definition of a "consumer report" under the Fair Credit Reporting Act is set forth at 15 U.S.C.A. Section 1681 (a) (d) (1974) as follows:

> "(d) The term 'consumer report' means any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (a) credit or insurance to be used primarily for personal, family or household purposes, or (2) employment purposes, or (3) other purposes authorized under Section 1681 (b) of this title. The term does not include (A) any report containing information solely as to transactions or

experiences between the consumer and the person making the report; (B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device; or (C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his decision with respect to such requests, if the third party advises the consumer of the name and address of the person to whom the request was made and such person makes the disclosure to the consumer required under Section 1681 (m) of this title."

Notwithstanding the expanse of definition of a "consumer report" as provided in the statute, for our purposes all consideration of whether or not General has furnished a "consumer report" can be resolved by reference to one small phrase of said definition. In the second sentence of the definition, we find the statement:

> "The term 'consumer report' does not include (A) any report containing information solely as to transactions or experiences between the consumer and the person making the report;"

A careful review of the depositions and affidavit filed in this matter to date reflects not one scintilla of fact upon which it can be stated, or even inferred, that General ever possessed or transmitted to anyone information which was not based solely and exclusively upon its transactions or experiences with Edgar Todd, Jr. and Alice Todd. As the record clearly establishes the only information possessed by General regarding the Todds was the initial information received from Hess's as to the amount owed on the overdue and delinquent account with Hess's and, thereafter, the record of payments received from the Todds in the reduction and eventual payment in full of that overdue account. The payments which reduced the aforesaid account were paid directly to General and were thereafter transmitted to Hess's.

In the previously cited case of *Peller v. Retail Credit Co., et al.*, 359 F.Supp. 1235 (N.D. Ga. 1973), the Court considered the very provision of the definition of a "consumer report" and found that the defendants who had moved for a dismissal of the complaint against them were entitled to same because of the previously discussed provision.

In the *Peller* case, Defendant Lincoln Zonn and Robly Hat, Inc., moved for dismissal of plaintiff's complaint against them alleging violations of 15 U.S.C. Section 1681. The Defendant, Robly Hat, Inc. had commissioned Defendant Lincoln Zonn to administer a polygraph examination to a prosepective employee of Robly Hat, Inc. Zonn informed Robly that the plaintiff, the prospective employee in question, had showed deception regarding certain questions and thereafter Robly refused to employ the plaintiff. Sometime thereafter the plaintiff obtained employment with Arthur Anderson Company and worked with them until Arthur Anderson was informed by Defendant Retail Credit Company of the results of the polygraph examination administered by Zonn on behalf of Robly.

Defendants Zonn and Robly moved for dismissal of the complaint as to them on the basis that they were not consumer reporting agencies and had not prepared a "con-

sumer report" regarding the plaintiff. The Court in reviewing the definition of a "consumer report" gave particular deference to the clause "the term does not include (A) any report containing information solely as to transactions or experiences between the consumer and the person making the report;" 359 F.Supp. at 1237. Having reviewed the facts of the case and noting the above definition the Court went on to state:

> "Under the facts as alleged, it does not appear that Zonn or Robly engages in whole or in part in the process of assembling or evaluating consumer credit information or other information on consumers for purposes of furnishing consumer reports. Likewise, information given by Zonn to its clients does not constitute a consumer report as the Act specifically excludes from its definition of 'consumer report' 'any report containing information solely as to transactions or experiences between the consumer and the person making the report.'" 359 F.Supp. at 1237.

Thereafter, finding that neither Zonn nor Robly were "consumer reporting agencies" nor that Zonn had distributed a "consumer report", the Court granted the motion to dismiss to Defendants Zonn and Robly.

The *Peller* case is substantially analogous to that under review by this Court. In this case you have an independent contractor, General, in the business of servicing certain business agencies with a particular service, i.e., collection of overdue and delinquent accounts payable. There is also a Respondent, Hess's, which is in the same substantial status as Robly Hat, Inc. was in the *Peller* case; that is a party in interest as to a particular individual for a limited purpose, i.e., the collection of an amount of money currently due and owing that merchant. Likewise, we have in this litigation a consumer reporting agency, the Credit Bureau, performing much the same function as that of the Respondent, Retail Credit Co., in the *Peller* case. On the basis of the rationale and legal standards applied in the *Peller* decision, the District Court was justified, and perhaps mandated, to grant the motion for dismissal or, in the alternative, summary judgment filed by Respondent, General.

Concerning the allegation that General either negligently or intentionally failed to maintain their records in an accurate fashion, the Respondent, General, again calls upon the Court to make a careful review of the depositions and the affidavit on file in this matter. There is nothing in any of those documents to reflect that any inaccuracy existed in the records of General regarding the Hess's account of Edgar Todd, Jr. and Alice Todd. As of September 10, 1974, the records of General reflected that the Hess's account of the Todds had been paid in full. Likewise, this fact was transmitted to Hess's even though the final payment which settled the account was made directly to Hess's. Lastly, the deposition of Mrs. Todd herself sets forth that she never had any dispute with General as to the remaining balance of her account during the period of time in which General had collected on said account.

On the strength of legal precedent set forth, as well as the statutory definition of "consumer report", the Respondent, General, was entitled to the dismissal of the complaint against it or summary judgment in its favor.

The depositions and affidavit in this case undeniably support this position and the evidence, even taken in the light most favorable to the Petitioner, fails to set forth any fact upon which a finding that General prepared or disseminated a "consumer report" could be based.

C. The Arguments Advanced by Petitioners' Brief, as to Respondent, General Credit Control, Inc., Are Predicated or Misstated or Nonexistent Facts, and Assert Liability Based Upon Theories for Which Neither Case Precedent Nor Statutory Law Are Cited for Authority

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The first and, in light of the facts of this case, probably the most significant objection which Respondent, General, has to the argument of Petitioners is the incomplete and grossly misleading definition of "consumer report" set forth in Petitioners' Brief on page 28. After quoting merely one small phrase of a multiphrase definition, which is specific in the exceptions it sets forth, Petitioners state:

> "Against these statutory definitions, the facts of the instant case must be examined." (Petitioners' Brief, p. 28)

Respondent, General, concurs with the Petitioners' position that the facts of the instant case must be examined in light of the statutory definitions of "consumer reporting agency" and "consumer report". Obviously, the entire definitions of those phrases must be considered and not merely the self-serving clauses which Petitioners have seen fit to reproduce in their brief. Those definitions

having been set forth heretofore in Sections A and B of this brief, further comment thereon at this point would be repetitive and improper.

Petitioners argue that Respondent, General, seeks to extend the holdings of the cases cited hereinabove in Sections A and B to be dispositive of the case before this Court. Respondent, General, notes that the questions of law currently before this Court on appeal are identical to the questions of law considered in those cases and it was based upon the resolution of those questions of law in each of the respective cases in question that the respective courts predicated their holding. In that respect, the considerations and rationale of those courts are directly relevant to the determination of the questions of law raised by Respondent, General, in its motion to dismiss or, in the alternative, for summary judgment. To the extent the respective Federal Courts in the cases in issue arrived at their ultimate holdings after making determinations of law, those determinations of law constitute judicial precedent for the position espoused by Respondent, General, in this case. Likewise, the application of the rationale and analysis utilized by those courts to the facts of this case compel the resolution of the issues raised herein in the very fashion the District Court disposed of same.

Petitioners argue that only banks were intended to be exempted from the confines of the Act as not being "consumer reporting agencies". In support of this proposition they cite the following excerpt from the legislative history:

> "The House conferees also intend that the definition of 'consumer reporting agency' not include fi-

> nancial institutions whose leading officers merely relayed information about an individual with whom they have had direct financial transactions." (Petitioners' Brief, p. 32).

A reading of the authority cited in proposition of Petitioners' position clearly indicates that it renders no support for that position whatsoever. Petitioners evidently ignore or do not see the word *also* in the first line of the statement they proffer in support of their position which clearly indicates that the House conferees intended that the definition of "consumer reporting agency" not include financial institutions of a certain type, *in addition to* any number of other institutions.

Petitioners argue that the Respondent, General, acted as an agent for the Respondent, Hess's, forming the third arm of the cooperative triangle of Associated-Hess's and General. (Petitioners' Brief, p. 38). As has been made abundantly clear heretofore in this brief, Respondent, General, had at no time any contact, membership in, association with, or ties to Respondent, Credit Bureau. As such, the descriptive allegation of Petitioners that Respondent, General, formed the third arm of the cooperative triangle is inappropriate, incorrect and grossly misleading. The formation of a triangle requires any given side to have a direct contact and connection to each of the other two sides. As the record makes apparent, no connection exists between Respondent, General, and Respondent, Credit Bureau.

With respect to this argument proffered by Petitioners, it is asserted that Respondent, General, while acting in its capacity as an independent contractor is somehow

vicariously liable, even if we accept the agency theory, for the misconduct of its principal. In this case, Petitioners would have the Court acknowledge the existence of vicarious liability of an agent for a principal's failure to act, where the agent had no knowledge of the facts giving rise to the alleged necessity of principal's acting, was unaware any action was necessary, and, perhaps more significant than anything else, was absolutely and unconditionally incapable of rendering the action allegedly required by his principal.

In support of this novel proposition of law, Petitioners offer the single case of *Wood v. Holiday Inns, Inc.*, 508 F.2d 167 (5th Cir. 1975) (Petitioners' Brief, pp. 39-40). At the conclusion of Petitioners' interpretation of the aforesaid opinion is stated:

> "In reaching this result, the Court specifically indicated that the agency principals were applicable under the statute." (Petitioners' Brief, p. 40).

Respondent, General, believes that upon a careful and complete reading of the aforesaid opinion it will become patently clear to This Honorable Court that the Court in *Wood v. Holiday Inns, Inc.*, supra, made no finding with respect to vicarious liability of an agent for the conduct of its principal who had violated the Fair Credit Reporting Act. In fact, in that case, the Court found that the motel clerk in question had acted in a tortious fashion and that the principal of that clerk was liable for the tortious conduct of his agent which actions took place within the normal course of the agent's employment by the principal. In that the opinion cited in no way stands for the proposition or establishes the theory of law that an agent can

be vicariously liable for his principal's failure to comply with a statutory requirement, which requirement is unknown to the agent and compliance with which the agent is incapable of performing, Respondent, General, respectfully argues that there is no basis for the aforesaid proposition asserted by Petitioners and that it, therefore, be disregarded.

Finally, Petitioners argue that since Respondent, General, attempted collection of the monies owed to Defendant, Hess's, after efforts by Respondent, Credit Bureau, failed, the Respondent, General, was obligated to inform the Respondent, Credit Bureau, of the results of its actions on behalf of its client, Respondent, Hess's.

> "Similarly, the Defendant, General obtained the monies—and its commission—and then did nothing to see that Defendant Associated, was advised that the account was now paid in full." (Petitioners' Brief, p. 45).

The aforesaid argument of Petitioners is based upon assumed facts, which do not exist, and a proposition of law for which no authority can be cited. As previously pointed out in the Statement of Case in this brief, the record is void of any inference, let alone statement of fact, which would indicate that Respondent, General, had any knowledge of the existence of a file being maintained on the Todds by Respondent, Credit Bureau. Likewise, there is nothing in the record which would indicate that Respondent, General, had any knowledge that Respondent, Hess's, had previously submitted the Todd account to Respondent, Credit Bureau, for collection and Respondent, Credit Bureau, was maintaining a record on the Todds.

Not being a member of the Respondent, Credit Bureau, having no knowledge of the existence of a file maintained by Respondent, Credit Bureau, with respect to the Todds; having no knowledge that Respondent, Hess's, had referred information with respect to the Todds to the Respondent, Credit Bureau; having no knowledge of the contents of the Respondent, Credit Bureau, account on the Todds with respect to the Hess's debt, the very existence of said account being unknown to Respondent, General; and, having no ability to effect any alteration in the records of Respondent, Credit Bureau, even if Respondent, General, had knowledge of the existence of a file reflecting improper information with respect to the Hess's account, it is inconceivable that Respondent, General, could in any way be liable for a violation of the Fair Credit Reporting Act.

CONCLUSION

A careful review of the depositions and affidavit, as well as the pleadings in this case, reflects that the only information which supports the position of the Petitioners is contained in the pleadings. The depositions taken in this case and the affidavit of Mr. Michael Shatsky are barren of any facts upon which even an inference that General Credit Control, Inc. is a consumer reporting agency can be based. Equally void of any support, even inferentially, is a proposition that a "consumer report" was either prepared or disseminated by General Credit Control, Inc. regarding the Hess's, Inc. account of Edgar Todd, Jr. and Alice Todd.

Argument

As was stated in the previously quoted case of *Porter v. Talbot Perkins Children's Services, et al.*:

> "Plaintiff avers that there is such a purpose here; officers of the Defendant by affidavit declare the opposite. (Citation omitted.) When the movant comes forward with facts showing that his adversary's case is baseless, the opponent cannot rest on the allegations of the Complaint but must adduce factual material which raises a substantial question of the veracity or completeness of the movant's showing or presents countervailing facts. Here, Plaintiff has adduced no such facts." 355 F.Supp. at 1359.

In light of the foregoing the Respondent, General Credit Control, Inc., is entitled to denial of the petition for writ of certiorari and thereby an affirmation of the District Court's granting of summary judgment in favor of Respondent, General Credit Control, Inc.

Respectfully submitted,

ROBERTS, TRAUD & WALLITSCH,

By: DENNIS W. ALEXANDER,

Attorneys for Respondent, General Credit Control, Inc.

In the Supreme Court of the United States

No. 78-430

EDGAR TODD, JR., and ALICE TODD,
Plaintiffs-Petitioners
vs.
ASSOCIATED CREDIT BUREAU SERVICES, INC., GENERAL CREDIT CONTROL, INC., and HESS'S, INC.,
Defendants-Respondents

BRIEF OF RESPONDENT, HESS'S, INC., OPPOSING PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE FACTS

Hess's, Inc., (hereinafter referred to as "Hess's") would urge that your Honorable Court, in reviewing the record, take notice of the fact that prior to the filing of their appeal brief with the Third Circuit Court of Appeals, Petitioners never alleged that General Credit Control, Inc., was the agent, workman or servant of Hess's, Inc. The complaint makes no such allegation and the subsequent record is devoid of any evidence which would substantiate Petitioners' agency claim.

In several instances, Petitioners' statement of the facts of the case claims that "credit information" was given by Hess's to Associated Credit Bureau Services, Inc. The statement of facts goes on to allege that Hess's never "updated" its "credit reports". Such references to "credit Information" and "credit reports" are inappropriate as they represent a conclusion of law and not a fact. In that regard, the record reads as follows:

> Q. Turning to what is for our purposes Page 3 of Exhibit 2 which is captioned service to be provided by Allentown Credit Bureau for Hess's, Mrs. Rohrbach, would you explain please Paragraph 5 of that page captioned credit bureau access to Hess's files, as to what that means to you—to Hess's?
>
> A. Do you want me to just explain it and not read it?
>
> Q. Yes.
>
> A. To us—to me this means that we would give the credit bureau a list of names, addresses, balances

at which time they would—they would know that they were not credit worthy at that time with Hess's. Now, the last sentence says follow-up information as to when payment in full of the past due balance has been received by Hess's will be forwarded to the bureau, and the big saving, whenever possible.

Q. And, the information that you would forward under Paragraph 5 of this agreement, what would be the source of that information?

A. It would be a delinquent account from our records.

Q. From your records?

A. Since delinquent accounts are for letter service.

Q. What would that account record be based upon?

A. Our file.

Q. Your file. Would that constitute transactions at your store?

A. Yes.

Q. Would it constitute information other than transactions at your store?

A. No.

(Deposition of Ruth M. Rohrbach Dated July 8, 1976, Pages 41 and 42.)

It is clear, from all the facts of record, that the only information given by Hess's to Associated Credit Bureau Services, Inc., was information relating solely to Hess's own transactions with it own charge customers.

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Is Respondent, Hess's, Inc., a "consumer reporting agency" within the meaning of the Fair Credit Reporting Act, 15 *U.S.C.* Section 1680, et seq.?

ARGUMENT

Respondent, Hess's, Inc., Is Not a "Consumer Reporting Agency" Within the Meaning of the Fair Credit Reporting Act, 15 U.S.C. Section 1680, et seq.

With respect to Respondent, Hess's, Inc., the sole question at issue in this case is whether or not Hess's, Inc., is a consumer reporting agency within the meaning of the Federal Fair Credit Reporting Act. If it is not, then the issues of accuracy, stale material, misleading information, and periodic updating, relating only to "consumer reports" and "consumer reporting agencies", as defined in the Act, are clearly inapplicable to Respondent, Hess's, Inc.

Hess's is a retail department store. Hess's merely provided the other Respondents in this case with its *own* ledger experiences. Hess's relayed only its *own* credit experience on the Petitioners to Associated Credit Bureau Services, Inc., and/or General Credit Control, Inc. All data supplied by Hess's contained information solely as to transactions and/or experiences between the Petitioners and Hess's. Any and all information assembled by Hess's was for the sole purpose of recording and controlling charge account privileges extended to its own customers. These facts are disputed. Given these facts, Hess's, Inc., is not a consumer reporting agency and the information obtained by the other Respondents from Hess's was not a consumer report.

The purpose of the Federal Fair Credit Reporting Act is:

> . . . To require that *consumer reporting agencies* adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

15 *U.S.C.A.*, Section 1681 (b), 84 Stat. 1128, Oct. 26, 1970 (emphasis added).

The Federal Fair Credit Reporting Act defines "consumer reporting agency" as:

> . . . Any person which, for monetary fees, dues, or on a cooperative non-profit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing *consumer reports* to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing *consumer reports.*

15 *U.S.C.A.*, Section 1681 (a) (f), 84 Stat. 1128, Oct. 26, 1970 (emphasis added).

The Federal Trade Commission has been given the responsibility of enforcing compliance with the requirements imposed under the Act. 15 *U.S.C.A.*, Section 1681 (a), 84 Stat. 1134, Oct. 26, 1976. Pursuant to this authority, the Federal Trade Commission has issued guidelines for the interpretation of the Act to which the Courts

may refer in determining issues which arise under the Act. *Fernandez v. Retail Credit Co.*, 349 F. Supp. 652 (E.D. La., 1972).

With respect to the interpretation of the term "consumer credit agency", the *Federal Trade Commission Compliance Pamphlet* states as follows:

> As indicated earlier, giving out a *firm's own ledger experience* does not make it a Consumer reporting agency or the information a consumer report. In order to be a consumer reporting agency, the firm must engage "in whole or in part" in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. When a firm gives *its own credit experience on a consumer to a credit bureau,* that information does not constitute a consumer report: . . .

4 CCH *Consumer Credit Guide,* Paragraph 11305 (emphasis added).

In the case of *Porter v. Talbot Perkins Children's Services, et al.*, 355 F. Supp. 174 (S.D. N.Y., 1973), a case in which prospective adoptive parents were rejected and subsequently sued the adoption agency under the Federal Fair Credit Reporting Act, the Court held that the defendant was not a credit reporting agency because its purpose in gathering information was not for distribution to third parties. The Court further stated, with respect to the statutory definition of "consumer credit agencies", the following:

> Essentially, this definition contains four links. (1) The consumer reporting agency must act for monetary fees, dues, or on a cooperative non-profit basis; (2) it must regularly engage in whole or in part in gathering or evaluating information on consumers; (3) the purpose of such activity must be the distribution of information to third parties engaged in commerce; and (4) the agency must use a facility of interstate commerce to prepare or distribute the reports.

Id. at pp. 176-177.

Respondent, Hess's, Inc., is a retail department store. Hess's is a customer of the Associated Credit Bureau Services, Inc., a corporation which is a consumer reporting agency within the Act. Hess's, Inc., has no proprietary interest in, owns no stock of, and has no control over Associated Credit Bureau Services, Inc. Hess's also maintains its own charge account privileges for its own customers and keeps records and ledgers with respect to said customers and the balances due and owing from said customers to Hess's, Inc.

In the event that Respondent, Hess's, Inc., is unsuccessful in its internal attempts to collect its own past due charge account balances, the delinquent accounts are forwarded to Associated Credit Bureau Services, Inc., and General Credit Control, Inc., for outside collection. Attendant to this procedure is the forwarding of ledger information containing Hess's own experience with its particular customer stating the total outstanding balance due Hess's. In addition, in limited situations, Hess's will, upon verified requests from Associated Credit Bureau Services, Inc., provide that Bureau with information relating solely to Hess's charge account credit transactions with its own, individual customers.

Hess's, Inc., does not supply this individualized information to the Bureau for monetary fees, dues, or on any cooperative non-profit basis. Hess's does not engage in whole or in part in gathering or evaluating information on customers. The only information available to Hess's is that which is shown on its own credit card ledger records. Any information which is in the hands of Hess's is not for the purpose of distribution to third parties engaged in commerce, but solely for the purpose of keeping accurate accounts of amounts due Hess's by its own charge customers. Hess's distributes no credit reports through any means of interstate commerce nor does it prepare any credit reports by virtue of said means.

The Court, in *Porter v. Talbot Perkins Children's Services, et al., supra,* went on to indicate that the focus of Congress in creating the Fair Credit Reporting Act was the consumer credit industry and of particular concern was the effect of the information compiled and forwarded by an entity not dealing directly with an individual. *See also;* 17 *ALR Fed.* 702 (1973). In the instant case, it is clear that Hess's, Inc. and other retail stores extending credit privileges to their own customers are not the entities toward which the Act is directed. The Act is directed at third party reports prepared and distributed by individuals or companies who have never dealt directly with the individual consumer. The undisputed facts in this case clearly indicate that Hess's, Inc., is not a consumer reporting agency as defined in the Act, nor as intended by Congress, the Federal Trade Commission, or the lower Federal Courts which have dealt with the Federal Fair Credit Reporting Act.

Respondent, Hess's, Inc., respectfully takes serious issue with Petitioners' interpretation of the cases upon which their brief relies. As more fully set forth hereinafter, those decisions simply do not substantiate Petitioners' theory with respect to Hess's. On the contrary, those cases support the position set forth by Hess's, Inc.

Beresh v. Retail Credit Company, Inc., et al., 358 F. Supp. 260 (C.D. Cal., 1973), contrary to the Petitioners' brief, gives no implication that a life insurance company becomes a credit reporting agency when it acts in concert with a credit bureau. In that case, the plaintiff sued the defendants based upon information gathered by a credit reporting agency and relayed to the insurance company. The information was requested by the insurance company in an effort to determine whether it should continue disability payments to the plaintiff.

The question before the Court was whether the investigative reports prepared by the defendant, Retail Credit Company, were "consumer reports" within the meaning of the Act. The case never addressed nor discussed the status of the insurance company under the Act, nor did it make any reference thereto.

Contrary to Petitioners' brief, *Hansen v. Morgan, et al.,* 405 F. Supp. 1318 (D. Idaho, 1976), did not state that merchants who are members of a credit reporting bureau become credit reporting agencies within the Act. That case involved a defendant who received information from a credit reporting agency and attempted to use it in a political campaign. The defendant was a member of that credit bureau and requested information which he later used to allegedly defame the plaintiff.

The Court stated that Section 1681(b) of the Act relates only to consumer reporting agencies, and not users, as the defendant was in that case. The opinion of the Court is completely devoid of any language which even infers that a merchant who participates in a credit bureau becomes a credit reporting agency itself. In fact, the case states the exact contrary; i.e., the participating merchant is a "user" and not a "credit reporting agency".

Greenway v. Information Dynamics, Inc., 399 F. Supp. 1092 (D. Ariz., 1974), also cited in Petitioners' brief involved a situation wherein the defendants provided subscribing merchants with check cashing information. This information was obtained from the member merchants based upon their own transactions with their consumers.

In that case, the plaintiff's claim, that the compiling agency disseminated more information than was necessary; i.e., random lists instead of answers to specific requests on particular transactions or consumers, was upheld by the District Court. However, the Court, in the first footnote to its opinion, specifically stated that an exception to the Act is information given solely as a result of transactions between the reporter and the consumer. The opinion never implied that the merchants who gave their own experiences and received the random lists from the reporting agency were themselves, credit reporting agencies.

Petitioners' claim, that Hess's, Inc., became a credit reporting agency by virtue of its association with Associated Credit Bureau Service, Inc., is simply not supported by the cases cited in their brief. In fact, those cases clear-

ly and correctly state, in accordance with the *Federal Trade Compliance Pamphlet*, supra, that such merchants are not credit reporting agencies as they provide only information based on their own transactions with their own customers.

The Federal Fair Credit Reporting Act defines "consumer report" as

> . . . any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility . . . *the term does not include (A) any report containing information solely as to transactions or experiences between the consumer and the person making the report; . . .*

15 *U.S.C.A.*, Section 1681a(d), 84 Stat. 1128, Oct. 26, 1970 (emphasis added).

The language set forth above is taken directly from the United States statute. It is clear that any information provided by Hess's, Inc., to the other Respondents in this case was not a consumer report, as defined by the Act. The Act clearly states that a consumer report is a communication of information by a consumer reporting agency. It has been clearly established above that Hess's, Inc., is not a consumer reporting agency. In addition, the *Federal Trade Commission Compliance Pamphlet*, supra, states precisely that ". . . when a firm gives *its own credit experience on a consumer* to a credit bureau, that infor-

mation does not constitute a consumer report . . ." 4 CCH *Consumer Credit Guide*, Section 11305, *supra* (emphasis added).

With respect to the provisions of 15 *U.S.C.A.*, Section 1681a(d), which exclude reports containing information solely as to transactions or experiences between the consumer and the person making the report; the *Federal Trade Commission Compliance Pamphlet* goes on to state that the exclusion in the definition of "consumer report", which encompasses those trade reference information exceptions designed to cover experience furnished by a creditor to other creditors of the consumer, is limited to "transactions and experiences" between the person contacted for information and the consumer, of which that person has firsthand knowledge.

In the case of *Peller v. Retail Credit Company*, 359 F. Supp. 1235 (N.D. Ga., 1973), *aff'd.*, 505 F.2d 733 (5th Cir., 1974), the Court was faced with a situation wherein the plaintiff was suing the defendant based upon information provided by the defendant to a prospective employer of the plaintiff. The defendant was in the business of giving polygraph examinations to prospective employees and then communicating the results to the employer. The District Court held that information given to a prospective employer by a polygraph operator is not a consumer report because that information contains only information solely as to transactions or experiences between the prospective employee and the person making the report; i.e., the polygraph company. The Court went on to state that the defendant was not a consumer reporting agency because it did not engage in assembling information for the purpose of furnishing consumer reports.

The case of *U.S. v. Puntorieri*, 379 F. Supp. 332 (E.D. N.Y., 1974), involved a situation wherein the plaintiff was suing the defendant bank under the Federal Fair Credit Reporting Act as a result of information given to the government at the request of the Internal Revenue Service. The Court, in granting the defendant's motion for a summary judgment, held that the information given by the defendant was a report containing information solely as to transactions between the consumer and the person making the report, and, as such, was not subject to the provisions of the Act.

In reviewing, analyzing, and summarizing the current state of the Federal Fair Credit Reporting Act, the editors of 17 *ALR Fed.*, at page 702, state, "It should be noted that the term 'consumer report' does not include any report composed entirely of information as to transactions and experiences between the consumer and the person making the report."

The information allegedly supplied by Hess's, Inc., to Respondent, Associated Credit Bureau Services, Inc., and/or Respondent, General Credit Control, Inc., is information relating solely to the experiences and transactions that Hess's, Inc., the entity making the report, had with the Petitioners and is based wholly on firsthand information. There is no intent that this information be a compilation of investigation or otherwise on behalf of Hess's, Inc.

Hess's, Inc., is not a consumer reporting agency and does not supply consumer reports. As such, the provisions of the Federal Fair Credit Reporting Act are not applicable to Hess's, Inc., and, consequently, the allega-

tions contained in Petitioners' complaint against Hess's, Inc., are without merit.

CONCLUSION

For the foregoing reasons, Respondent, Hess's, Inc., is entitled to denial of the petition for writ of certiorari and thereby an affirmation of the District Court's grant of summary judgment in its favor.

Respectfully submitted,

JOSEPH F. LEESON,

Attorney for Respondent, Hess's, Inc.